

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

In Re: Bard IVC Filters) MD-15-02641-PHX-DGC
Products Liability Litigation)
) Phoenix, Arizona
) May 18, 2018
Doris Jones, an individual,) 8:30 a.m.
)
Plaintiff,)
) CV 16-00782-PHX-DGC
vs.)
)
C.R. Bard, Inc., a New)
Jersey corporation; and Bard)
Peripheral Vascular, Inc., an)
Arizona corporation,)
)
Defendants.)
)

BEFORE: THE HONORABLE DAVID G. CAMPBELL, JUDGE

REPORTER'S TRANSCRIPT OF PROCEEDINGS-AMENDED

(Jury Trial - Day 4 - A.M. Session)
(Pages 720 through 861, inclusive.)

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Proceedings Reported by Stenographic Court Reporter
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I N D E X

17 WITNESS: DIRECT CROSS REDIRECT RECROSS

18 ROB CARR

19 (Resumed)

20 By Mr. Lopez 743

21 DEREK MUEHRCKE, M.D.

22 By Mr. Combs 752 806

23 By Mr. North 786

24 INDEX OF EXHIBITS25 EXHIBIT IDENT RECEIVED571 PowerPoint Presentation entitled
BPV Filter Franchise Review dated
5/6/2008 822 812

589 (No Description Available) 812

	<u>EXHIBIT</u>		<u>IDENT</u>	<u>RECEIVED</u>	
1	590	(No Description Available)		812	
2	591	Bard Idea POA on the Denali Filter,			
3		Project No. 8108 Rev. 0.0, revised		812	
	592	August 2009 by Bret Baird			
4		E-Mail between you and Brian			
		Reinkensmeyer in April of 2010	839	812	
5	1053	Document RE. "Product Opportunity			
		Appraisal for Recovery Filter",	816	812	
6	1568	Post-Market design review marketing			
		Summary	847	812	
	1621	(No Description Available)	844	845	
7	1740	1/18/2010 E-mail from Bret Baird			
8		(Marketing Manager of IVC Filters)			
		To Sales Team listserve (TPE-PV Sales-DG)			
9		Re. "Important: Eclipse Vena Cava			
		Filter Launch Details"		812	
10	1788	10/2/2010 E-mail Thread from Jeffrey			
		Pellicio Re. "Meridian			
11	1950	Commercialization Plan"		812	
		Meeting Summary of the IVC Filter			
12		Focus Group meeting held on 6/1/2006			
		In Chicago, IL at Hilton O'Hare	747	-	
	2453	Expert Report of Derek Muehrcke	793	-	
13	4414	Email from Brian Reinkensmeyer to			
		Baird cc Pellicio and Randall			
14		Re "Filter study Idea"		812	
	4416	Bill Little email re Eclipse Filter			
15		Naming	850	812	
	4428	Eclipse Vena Cava Filter Ad	761	761	
16	4454	Eclipse Vena Cava Filter Concept			
		POA, Revision 2	835	812	
17	4455	Vail Vena Cava Filter DIS	837	812	
	4456	Eclipse Vena Cava Filter Product			
18		Performance Specification (PPS)		812	
	4457	Vail Filter System DFMEA		812	
19	4467	8/12/2011 email from Mike Randall to			
		Joni Creal re Corp approval needed			
20		For Cleveland Clinic Studies w/			
		Attached PowerPoint slides			
21		Re Filter Fixation and Migration:			
		Forces and Design		812	
22	4468	6/10/2011 email from Mike Randall			
		Re Meridian Presentation for SSM 2011		812	
23	4469	Data Source Evaluation memo from			
		Natalie Wong to Quality Systems			
24		Coordinator, October 2010	855	812	
	4499	Meridian Vena Cava Filter vs. Eclipse			
25		Vena Cava Filter	856	812	

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P R O C E E D I N G S

THE COURT: Good morning, everybody.

Counsel, I assume you saw the order I entered last night on the 1006 chart and other documents. And assuming we have time, I would like to talk about that this morning. But I want to make sure we address any issues that need to come up for this morning's events.

08:30AM

Are there any other issues besides those that plaintiff or defendants wish to raise?

MR. O'CONNOR: Nothing that we can think, of Your Honor.

08:30AM

THE COURT: Okay.

MR. NORTH: Your Honor, we have one concern that we would like to express. And we believe that yesterday there were a lot of implicit statements made that would suggest other litigation which this Court has previously ruled should not be admitted in front of this jury. There were a number of questions about what occurred where Mr. Lopez would ask what occurred two months ago with Mr. Carr. There were questions that were talking about depositions and identifying the names of specific other cases. And we think this could easily be cured by just referencing, have you told me in the past or on a previous occasion without that specificity. And we would ask that the Court instruct all the parties to speak in those terms as opposed to specific references that suggest previous

08:30AM

08:31AM

08:31AM

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1 litigation.

2 THE COURT: Comments from plaintiff's counsel?

3 MR. LOPEZ: I think he's talking about me.

4 I thought I was pretty careful, actually, Judge. I
5 don't think I mentioned a case. I don't think I did. The
6 difficulty is one of them was a trial transcript. I mean,
7 should I just call it a deposition?

08:31AM

8 THE COURT: Well, when you referred to that you said,
9 two months ago, didn't you testify two months ago. But I don't
10 think you referred to a trial.

08:32AM

11 MR. LOPEZ: Yeah.

12 THE COURT: I think you were careful not to refer to a
13 trial. You did, probably a dozen times, refer to something two
14 months ago.

15 MR. LOPEZ: Right.

08:32AM

16 THE COURT: From which the jury, I assume, was
17 thinking it was either a deposition or a trial two months ago.
18 I don't think there was anything said to show it was a trial.
19 What cases are you thinking of he mentioned?

20 MR. NORTH: He mentioned the Phillips case which was a
21 case tried in Reno in front of Judge Jones. He mentioned the
22 Tillman case in reference to a deposition, a case in Florida,
23 just when referring to deposition transcripts. I'm not
24 suggesting there was anything intentional done. I just think
25 we need to be careful about these references.

08:32AM

08:32AM

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1 MR. LOPEZ: I thought I was, Judge. If I slipped,
2 it's difficult when you are trying to -- I don't think I said
3 Tillman. I do remember saying Phillips. I think I was asking
4 Gay to find the transcript. That's the only way I could
5 identify it.

08:33AM

6 THE COURT: I think what we ought to do going forward
7 is let's just refer to previous testimony. We told the jurors
8 the depositions are testimony. So say didn't you say in
9 previous testimony and avoid references to cases. If you think
10 for some reason you need to call attention to a particular bit
11 of testimony that you think will jog the witness's memory you
12 can use a time: Didn't you in previous testimony two months
13 ago, or a few years ago. But I do think we -- I mean, I had
14 the same thought as this was going on.

08:33AM

15 MR. LOPEZ: It's difficult.

08:33AM

16 THE COURT: It's dropping clues. I know you were
17 trying to avoid it. So let's just refer to it as previous
18 testimony and do our best to stay away from it so we honor the
19 Motion in Limine.

20 MR. LOPEZ: The only reason I said the two months ago
21 is because I was trying to -- he was not remembering a lot of
22 stuff, Your Honor. I thought it was important, at least from a
23 credibility standpoint he wasn't remembering things he said two
24 months ago. Can I still do that? I'm not doing it this
25 morning because I'm done with that.

08:34AM

08:34AM

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1 THE COURT: Let's refer to previous testimony and try
2 to avoid references to time, if we can.

3 MR. LOPEZ: We do have one issue that I thought of. I
4 will have -- we don't have to deal with it now, but there was
5 one part of the transcript in his testimony where I asked him 08:34AM
6 about the Recovery Filter, and he really downplayed the
7 problems with the Recovery Filter. I will find the transcript.
8 We can probably deal with it next week. But I think that's one
9 more step toward it being unfair that we can't reveal to the
10 jury the significance of the problems with the recovery. And 08:35AM
11 he almost made it sound like it was an act of valor that they
12 took it down because it only had minor issues.

13 THE COURT: If we're not going to be addressing it
14 this morning, let's not spend time on it. Because I will need
15 to look at whatever you are talking about next week. You can 08:35AM
16 raise it next week but I'd rather spend time on the other
17 issues this morning.

18 Anything else that needs to be raised?

19 MR. NORTH: Nothing.

20 THE COURT: In the order I entered last night I raised 08:35AM
21 three issues for folks to address.

22 MR. CLARK: Your Honor, I'm sorry. I did have one
23 short matter for one of the witnesses this morning. We plan to
24 call Mr. Bret Baird. And one of the exhibits that we do intend
25 to use with him is Exhibit 4416, which is the "break the 08:35AM

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1 baggage" memo. I did want to get some clarification from the
2 Court because I could anticipate this could come up on a
3 opening the door type issue with respect to lawyer advertising
4 and I would rather not take the time at sidebar while the jury
5 is empaneled.

08:36AM

6 THE COURT: So what's the issue you are asking me to
7 address?

8 MR. CLARK: I plan to move it into evidence. And what
9 I want to get some clarification is the Court's order in
10 denying -- I'm sorry -- granting the Motion in Limine Number 7
11 relating to lawyer advertising indicated that it is possible
12 that plaintiffs would be opening the door to evidence
13 concerning the filter law website. And I just want to address
14 that now so we don't have to deal with it later.

08:36AM

15 We don't think that it is accurate that that is, in
16 fact, what the meaning of baggage was. Obviously, if the
17 defendants have a different position we would like to know that
18 now so we kind of know which direction to go.

08:36AM

19 MS. HELM: Your Honor, I told Mr. Clark yesterday when
20 we talked about this that it was our position that if they went
21 into "break the baggage" that the witness's explanation of what
22 that baggage was would open the door to attorney advertising
23 that was taking place back at the time the Eclipse Filter was
24 on the market. There was a website called filterlaw.com that
25 did not involve these lawyers but that competitors of Bard

08:36AM

08:37AM

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1 found out about and were using it to market and try to sell
2 against Bard. The sales and marketing teams at Bard spent a
3 tremendous amount of time countering this bad press and what
4 their competitors were using, how they were using what was, in
5 fact, attorney advertising to sell in the marketplace.

08:37AM

6 We have instructed all of our witnesses that they
7 can't -- that we have instructed them very clearly that they
8 can't use -- they can't talk about what was happening at the
9 time. It actually came up with Mr. Carr yesterday. Mr. Lopez
10 asked him a question that said: Did the sales force need to be
11 re-energized? And he said yes, absolutely, but couldn't
12 explain what was going on in the marketplace.

08:37AM

13 So I do believe that -- I mean, Mr. Baird, if allowed
14 to testify, will explain that the baggage is not complications
15 with the filter. It's what was going on in the marketplace
16 because of this filterlaw.com which was, in fact, attorney
17 advertising. So we believe it at least opens the door to that
18 attorney advertising and what was going on in the marketplace
19 at the time so that the witnesses can truthfully and fully
20 explain what the baggage is. Otherwise, the implication is
21 that it's complications and problems with the filter.

08:38AM

22 THE COURT: Was Mr. Baird a party to this e-mail, this
23 communication?

24 MS. HELM: Yes, Your Honor, he was. He wrote it.

25 THE COURT: He's the one who said "baggage."

08:38AM

08:38AM

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1 MS. HELM: Yes, Your Honor.

2 THE COURT: So, Mr. Clark, what is your response to
3 the suggestion that he should be able to explain what he meant
4 by "baggage" even if it includes that website?

5 MR. CLARK: I think just to be clear, Your Honor, if 08:38AM
6 he is going to testify that baggage -- what he meant by
7 "baggage" was this website, then you are right. We have opened
8 the door to that narrow issue. But what I don't want to have
9 happen is this case to turn into an indictment of lawyer
10 advertising, that there were other things. So I think we need 08:39AM
11 to have some type of structure that it is this website, and it
12 does not involve the lawyers in this courtroom. Because I feel
13 like that could be misleading. Particularly, you heard how
14 important this issue was to the members of the panel before we
15 got the jury. 08:39AM

16 So I think if we can just have some clarification he
17 would be referring to that website, it was back at the time
18 this memo was drafted and didn't involve the lawyers in this
19 courtroom, I think that's a fair compromise.

20 THE COURT: So I understand you to be saying, Mr. 08:39AM
21 Clark, that you still want to introduce it.

22 MR. CLARK: Yes.

23 THE COURT: Even if the response from Mr. Baird is the
24 baggage was a reference to this filterlaw website that was
25 causing us problems in the marketing that was lawyer 08:39AM

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1 advertising but somehow clarifying not advertising by these
2 lawyers. I know that's not ideal for you, but if that's his
3 truthful description of what he meant by "baggage" you are not
4 suggesting I prevent him from doing that as I understand.

5 MR. CLARK: No, Your Honor. We questioned that was 08:40AM
6 only thing he meant by that, but I think that's fair game. But
7 again, just that specific website.

8 THE COURT: Okay. Ms. Helm, do you see it any
9 differently in terms of what his specific response would be?

10 MS. HELM: No, Your Honor. We believe, and we believe 08:40AM
11 the fair compromise is to limit it to the advertising that was
12 taking place at the time the documents were written. And that
13 was, indeed, the filterlaw.com website.

14 THE COURT: And does he have any knowledge as to
15 whether or not these lawyers were involved with that? 08:40AM

16 MS. HELM: No, he doesn't have that knowledge.

17 THE COURT: It seems to me in fairness what we ought
18 to do, subject to your comments, is either during that
19 testimony or afterward, have me tell the parties or you tell
20 the parties that the parties agree that the plaintiff attorneys 08:41AM
21 in this case were not involved with the filter website,
22 filterlaw website.

23 MS. HELM: Your Honor, I think I can say -- I mean,
24 he's going to say, I don't know who it was. And we can say
25 well, we know it wasn't the lawyers here in the courtroom but 08:41AM

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1 there was a website or something like that. I think I that
2 would be fine.

3 THE COURT: You would do it during your questioning?
4 Is that what you are thinking?

5 MS. HELM: Yes, Your Honor.

08:41AM

6 THE COURT: So we will find a way to make clear to the
7 jury it doesn't involve any plaintiff's attorneys. And if, Mr.
8 Clark, after the witness has testified you think additional
9 clarification is needed, call for a sidebar and we'll talk
10 about that.

08:41AM

11 MR. CLARK: Thank you, Your Honor.

12 THE COURT: Okay.

13 MS. HELM: Thank you, Your Honor.

14 THE COURT: We've only got 17 minutes left. I'm going
15 to confine each of you to about five or six minutes. What I
16 want to do is hear your responses on the three issues that I
17 raised plus any others.

08:41AM

18 Let's start with plaintiff.

19 MS. REED-ZAIC: Your Honor, I read your order last
20 night, and I believe the first question pointed at the
21 plaintiff is the case that was provided, the *Schwartz* case, and
22 if there was contrary authority found, contrary cases. And I
23 did not find any contrary authority in the Ninth Circuit. I
24 found other cases, specifically the *In Re: Tylenol* case, 181
25 F. Supp. 3d 278.

08:42AM

08:42AM

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1 THE COURT: I'm sorry. 181 F. Supp. 3d --

2 MS. REED-ZAIC: 278.

3 THE COURT: Is there a page cite?

4 MS. REED-ZAIC: It is 287.

5 THE COURT: Okay. It's Section 4 under Westlaw. It's 08:42AM

6 a Section 4 headnote. It involves notice and describing the

7 fact that the extent to which defendants were on notice of the

8 potentially adverse effects of Tylenol would be relevant to

9 showing how intentional the behavior was and not addressing a

10 potential problem or safety signal and the number of adverse 08:43AM

11 events will not necessarily be limited. It was a pretrial

12 ruling, however, again, not controlling in the Ninth Circuit.

13 But there are cases that indicate this sort of information.

14 Let me cut to the chase.

15 THE COURT: *Schwartz* isn't controlling either. 08:43AM

16 *Schwartz* is an unpublished decision.

17 MS. REED-ZAIC: Understood. But it's in the Ninth.

18 It's informative. Let me cut to the chase. At the end of the

19 order there was a question whether this proposal of providing

20 the number of adverse events, counting them up and then 08:43AM

21 providing a sampling. We -- I'd like to make a record that I

22 think the *Schwartz* case is absolutely completely different to

23 the nth degree in the sense that the defendant was not selling

24 showers. They were not selling showers and saying there's a

25 coating and film that's going to prevent falls and it's going 08:43AM

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1 to prevent these particular adverse events and injuries. It
2 was a hotel describing notice of how many times people had
3 fallen. So it's a completely different set of circumstances.

4 And in this case in particular, the defendant has used
5 the lack of reporting and the lack of the number of adverse 08:44AM
6 events. So they have brought the cumulative -- alleged
7 cumulative nature of this issue to the forefront themselves,
8 starting from opening statement and stating that 99 percent of
9 Eclipse filters sold had no reported events, fractures,
10 migrations, et cetera. And we always feel that showing the 08:44AM
11 summary and nature and extent and the characterizing the actual
12 adverse events counterbalances the presentation of numbers and
13 the claimed lack of reporting by a natural phenomenon effect
14 that they are not required to report. It evens the playing
15 field in the 403 analysis to allow us to present the nature and 08:44AM
16 extent of the actual injuries.

17 We understand the Court's proposal with regard to
18 rather than sending back, you know, a thousand of these,
19 although substantially similar according to the codes and the
20 searches that we have done we're not opposed to the proposal. 08:45AM
21 I guess we would sort of need to understand what that's going
22 to look like if we were to take 10, I'll call them exemplars,
23 examples, of injuries for each particular filter as long as we
24 can provide the number at the end of the day of each particular
25 failure mode. I think we would be okay with that. 08:45AM

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1 But I think -- and I don't know if Mr. Lopez would
2 like to comment. We got in a long discussion about this last
3 time about the presentation of it, and we don't know what the
4 defendants' objections would be. I know we're limited on time.
5 There was an issue asking the defendants if they had actually
6 reviewed the exhibit, and I just wanted to point out it was in
7 our bench brief, that that exact exhibit with the caveat was
8 actually attached to our filing back Docket Number 10068 when
9 we were opposing the initial Motion in Limine with regard to
10 other complications.

08:45AM

08:46AM

11 So they have had a substantial number of these in the
12 exact format. The only difference being is that there was a
13 later production of adverse events from 2013 to 2015 that we
14 hadn't yet reviewed. And we reviewed those adverse events
15 produced by the defendants just this within the last month
16 since the last filing. And we added just the fractures related
17 to this case, of course, to get something in front of the
18 court.

08:46AM

19 So they have had this exhibit, essentially, since the
20 filing a few months back.

08:46AM

21 THE COURT: Thank you.

22 MR. NORTH: Your Honor, we did look through the
23 exhibit. And Ms. Reed-Zaic is completely correct. We have had
24 access to the exhibit. We acknowledge that the exhibit
25 correctly and accurately reflects the event descriptions from

08:46AM

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1 the complaint files. We do believe there are two or three that
2 really are not in the complication areas that the Court has
3 outlined. But if the Court were to decide to admit the exhibit
4 in its entirety, that's certainly something we could work out
5 with counsel as far as that's concerned.

08:47AM

6 Before I get to the meat of the argument, I did want
7 to mention one other small thing. But if this Court were to
8 decide to admit the three actual complaint files that were
9 mentioned yesterday, I would like to note for the record that
10 Exhibit 3270, one of those complaint files, has my name
11 littered throughout it because it was one of those cases that I
12 mentioned, events that came to the attention of the company
13 through litigation. And my office was the source of a lot of
14 the information that the company had to analyze and investigate
15 the claim. And if that were to be admitted, I would
16 respectfully request under 403 that any mention of my name be
17 redacted because I think it injects issues into the proceeding
18 that should not be there.

08:47AM

08:47AM

19 As far as the Rule 403 issue goes, this is a matter of
20 great concern to Bard in this particular litigation. This
21 case, Ms. Jones' case, like probably 80 to 90 percent of the
22 cases in this MDL involve not a significant long term injury
23 with regard to this filter. Yes, there has been a
24 complication. But as far as the sequela of that complication
25 it is not, as the Court has heard and will heard, going to be

08:48AM

08:48AM

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1 as significant as what they are trying to portray with many of
2 these events.

3 They have -- and nobody is contesting the fact that
4 they can get in to this Court and in front of this jury the
5 number of adverse events in all of these categories that have 08:49AM
6 occurred. We have never objected to that. We have, in fact,
7 touted the low adverse event rate that we compute. All this
8 issue is about is their desire to get the gory details of every
9 single report of an adverse event. And it is -- they want to
10 overwhelm the jury with a 450-page document that makes it 08:49AM
11 appear that there are many more events than there are, and they
12 want all these descriptions, many of which have never been
13 verified, in front of the jury to argue that just by the
14 cumulative nature there must be something wrong here.

15 We believe that is not only cumulative but extremely 08:49AM
16 prejudicial for Bard. If this Court were to decide consistent
17 with what the Court did in *Schwartz* to select or limit the
18 number, we would ask that the plaintiffs not be allowed to
19 unilaterally choose that number. If the Court were to, for
20 example, as suggested or mentioned in the order last night, 08:50AM
21 limit the number of events to 40, they should be randomly
22 selected or each side should get to choose 20. Otherwise, they
23 are going to go and find the 40 most severe injury cases
24 reported when the vast majority of the events described in that
25 spreadsheet are asymptomatic events. They are going to find 08:50AM

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1 the handful that did involve a death or very, very serious
2 invasive surgery of some sort.

3 We believe it's going to be difficult, in all candor,
4 for Bard to get a fair trial if the jury has a 450-page
5 document that outlines in gory detail all these unverified 08:51AM
6 facts about patients who had complications. We are afraid it
7 is going to distract this jury's attention from the fundamental
8 issue here, which is was the Eclipse Filter defectively
9 designed, and was there an adequate warning with regard to the
10 Eclipse Filter. And how -- we have already acknowledged they 08:51AM
11 can put in how many of these events occurred. But to overwhelm
12 the jury with that level of minutia on that many events,
13 merely, we believe, creates a prejudice that we cannot
14 overcome.

15 And particularly, the probative value of those details 08:51AM
16 is very marginal given the fact that the occurrence itself is
17 already going to be in front of the jury. The fact that there
18 were, let's say, 300 fractures, that's going to be in front of
19 the jury. The fact that there were 200 migrations, that's
20 going to be in front of the jury. 08:52AM

21 So the probative value of every minutia detail with
22 regard to each of those events is marginal particularly
23 compared to the prejudice that will be involved. So that for
24 that reason, we would ask for this Court to significantly limit
25 what can come in to the jury from that spreadsheet under Rule 08:52AM

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1 403.

2 THE COURT: Okay. Thank you.

3 Any other comments? Ms. Reed-Zaic.

4 MS. REED-ZAIC: Mr. Lopez would like to make a
5 comment. But since I'm more familiar with the actual complaint
6 files I would like to state this for the record. We're not
7 opposed to redacting Mr. North's name on the one particular
8 complaint. But I did want to mention that this statement about
9 gory details, the only thing that's in the summary is their
10 event description. And that does not include a lot of the
11 details in these complaints. It is filtered through a Bard
12 employee who collects all of the information and all of the,
13 quote, gory details and puts it into an event description
14 filtered through them. And that is the only thing that is on
15 that chart. There is a lot of other information when you walk
16 through a complaint detail about things I put in the Court
17 previously, you know patient taken back, pull stopped, detail
18 after detail of communications. And the only thing on the
19 chart is the summary.

20 MR. LOPEZ: You know, as the Court knows from the
21 Booker trial and from opening statement, the defense in this
22 case is that there are only a certain percentage of the
23 fractures and migrations and perforations. That doesn't tell
24 the story. What tells the story is what the severity -- this
25 is a risk/benefit case. Their argument is that the risks --

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1 the benefits of these outweigh the risk. Just saying there's a
2 fracture doesn't tell the story. What tells the story are what
3 happens to individual plaintiffs. And in the summary sometimes
4 it's a combination of fracture migration and tilt. So to take
5 out, you know, the details of some of these that are
6 particularly those that are like Ms. Jones is not allowing us
7 to tell the jury what the true risks are in this case just to
8 count up numbers.

08:54AM

9 THE COURT: Let me tell you the concern I have about
10 that argument so you can respond to it.

08:54AM

11 If it's true that every filter has these
12 complications, some level of migration and tilt and perforation
13 and fracture, and it seems to me you could pick out a filter
14 that everybody agrees is reasonably designed and reasonably
15 marketed. And in a trial you could zero in on the specific
16 difficult human details of the complications that come with
17 that filter in asking the jury to decide whether it's
18 reasonable. And if the jury is focusing in on those human
19 details they could conclude it's not reasonable even though
20 that level of complication is accepted by everybody as
21 appropriate given the risk/benefit.

08:54AM

08:55AM

22 My point is, it seems to me that the details can lead
23 to an inaccurate conclusion out of a motion, and that's one of
24 the things I'm wrestling with, is I understand it's part of the
25 story, but it's a part of the story that evokes human emotion.

08:55AM

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1 And even for a reasonably designed filter to cause a jury to
2 say it's not reasonable, look at the suffering these people
3 went through. Could you address that?

4 MR. LOPEZ: I can. For example, in the last trial I
5 think it was Dr. Hurst that said the Simon Nitinol Filter has
6 fractures, but it doesn't do anything to the patient because it
7 stays encased within the body of the filter. These conical
8 shaped filters, when you have a fracture, the risk level is
9 significantly higher.

08:55AM

10 THE COURT: I understand that, that point about the
11 fracture.

08:55AM

12 MR. LOPEZ: So for them to think that this is just a
13 balancing act between whether one device fractures more than
14 the other doesn't tell the story about the risk of fracture
15 with the design of this device. There are a number of these
16 complaints where, just like Ms. Jones, where a piece of the
17 filter embolized. Embolization is a different from a migration
18 where the filter just moves up and down within the vein or a
19 fracture that someone finds within the wall of the vena cava.
20 The real risk here to the design of this thing is not only the
21 fact that it has a higher incidence of reported fractures, that
22 higher incidence of reporting fractures puts patients with that
23 filter at an increased risk of death, frankly, of serious
24 consequences. For this -- they want to turn this into a case
25 of how many fractures, how many migrations, how many

08:56AM

08:56AM

08:56AM

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1 perforations because what do they do? They go to the SIR
2 guidelines and they pigeonhole these things into what was
3 reported in the literature about devices that are no longer on
4 the market or have nothing to do with the Bard filter. They
5 didn't analyze the Bard filter. If you were to do this today
6 maybe the SIR would say, here's a category of fractures, of
7 pieces that embolized to the heart, and, you know, our position
8 is that is much more significant design problem than just we
9 have -- we've got fractures that are within the acceptable
10 range of fractures.

08:57AM

08:57AM

11 That is -- talk about misleading. That's not giving
12 us a fair trial because the risk has to be what the risk is.
13 The risk here, the severity of this risk is much different than
14 just the fact that there's been a history of fractures. They
15 are going to say we warn of fractures in our IFU. Ours is
16 that, no, you should be warning of how many times you have had
17 a fracture of these devices where a strut has either gone into
18 the heart or through the heart into the lung like it had with
19 Ms. Jones. Because that's what she needs to be warned about,
20 not the fact that there are fractures.

08:57AM

08:58AM

21 THE COURT: Okay. I understand that point. Thank
22 you.

23 MS. REED-ZAIC: I'm sorry. Just one more point. Mr.
24 North's commentary that we would have the default position of
25 pulling the most severe injuries and front load that or try and

08:58AM

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1 mislead this jury, you know, this was a questionnaire process.
2 This is a very educated jury. I don't think it would behoove
3 us to put in deaths and procedures that Ms. Jones did not
4 undergo or injuries that are not substantially similar. And
5 the fact that two or three complaint files that actually went
6 in front of Mr. Modra were fractures, they were a piece that
7 embolized to the heart or lungs. They were substantially
8 similar to her injuries.

08:58AM

9 THE COURT: Do you agree that if we were to do a
10 representative sample it would have to be a representative
11 sample. It couldn't pick out the 20 or 40 worst instances. It
12 would have to be indicative of what's in the entire body of the
13 complaints.

08:58AM

14 MS. REED-ZAIC: True. And we actually started to do
15 that with Mr. Modra and refined it such that it was even more
16 relevant to this actual case.

08:59AM

17 THE COURT: All right. We've got to get the jury in.
18 I will tell you this. I find this to be a challenging issue.
19 I need to think about it. I have read three or four of the
20 entries in the big exhibit. I'm going to read much more of it
21 and look at the case that's been cited.

08:59AM

22 MS. REED-ZAIC: There's a housekeeping matter.

23 THE COURT: Do my best to come up with the right
24 decision. Let's get the jury.

25 MS. SMITH: One issue plaintiffs would like to

08:59AM

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1 address, if plaintiffs are seeking one-week extension to
2 defendants' Motion to Seal certain trial exhibits, it's Docket
3 11010, we have met with defendants and they agree. And we're
4 just seeking relief from the Court.

5 THE COURT: That's fine.

08:59AM

6 MS. SMITH: Thank you.

7 (Jury in at 9:00 a.m.)

8 THE COURT: Good morning, Ladies and Gentlemen. Thank
9 you all for being here. We are going to pick up where we left
10 off last night with the testimony of Mr. Carr.

09:00AM

11 MR. LOPEZ: Thank you, Your Honor.

12 ROB CARR

13 called as a witness herein, having been previously sworn, was
14 examined and testified as follows:

15 DIRECT EXAMINATION (Resumed)

16 BY MR. LOPEZ:

17 Q. Good morning, Mr. Carr.

18 A. Good morning.

19 MR. LOPEZ: Could we, Gay, put up Exhibit 770? I
20 think we were talking about that right near the end of the day.

09:01AM

21 Can I publish it to the jury, Your Honor? It's
22 admitted.

23 THE COURT: Yes.

24 BY MR. LOPEZ:

25 Q. And if we go to Page 5 of this document, again, just can we

09:01AM

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1 just remind the jury what is a Concept POA as Bard uses that
2 phrase?

3 A. It's an initial business document that is put together to
4 frame out a potential project, puts together, in this case, a
5 next filter, lays out the potential market, some of the
6 situations going on in the market, some of the hypotheses for
7 the program. So it's just a business document.

09:01AM

8 Q. Multiple people contribute to the content of a document
9 like this?

10 A. They can, yes.

09:02AM

11 Q. And they gather up whatever information within the company
12 to put into a document like this so it can be summarized and
13 discussed among other people within the company. Is that
14 accurate?

15 A. Yes.

09:02AM

16 Q. If you look at Page 5, we have -- in your screen, and --

17 A. I have Page 6. I'm sorry.

18 Q. Should be Exhibit 770.005. At the top it should say
19 description of unmet needs. Do you see where I am?

20 A. Yes. Sorry. Mine says Page 6. I'm sorry. On the top.

09:02AM

21 Q. Okay. I see.

22 A. Sorry.

23 Q. So what was the situation? Was that just what's the
24 current situation that the company is aware of?

25 A. Partially, yes. So SPIN, situation, problem, implication,

09:02AM

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1 and needs is a way -- it's a popular selling tool, and it's
2 also a way that we try and develop programs. So we go and try
3 and identify current situations, what problems do those
4 situations have, what are the implications of those problems,
5 and then what are the needs and/or solutions of those. And so
6 it's a popular selling method.

09:03AM

7 Q. Gotcha. So the situation here was physicians are very
8 sensitive to complications with optional IVC filters that make
9 it difficult to retrieve or that increase the risk for
10 patients. And Number 2, physicians decide to place filters in
11 patients based on the risk/benefit tradeoff. And Number 3,
12 physicians decide on which filter technology to use based on
13 the risk/benefit tradeoff.

09:03AM

14 Did I read that correctly, sir?

15 A. Yes.

09:03AM

16 Q. And then the problem, there are three problems identified.
17 Number 1, no filter is benign without complications and
18 optional filters get more scrutiny as a result of retrievals;
19 and Number 2, the Bard G2 has a reported rate of 12 percent
20 caudal migration, 18 percent tilt, and 22 percent penetration
21 in the EVEREST trial. And the third problem is though the
22 reported incidence rate of G2 Filter fracture is low, the
23 severity of fractures can be significant.

09:04AM

24 Did I read those correctly?

25 A. Yes.

09:04AM

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1 Q. And the implications, number one, physicians who experience
2 even one challenging filter case may react strongly and choose
3 to move away from using the product altogether.

4 Did I read that one correctly?

5 A. Yes.

09:04AM

6 Q. Complications may drive physicians to become more selective
7 in patient usage of vena cava filter therapy; Number 3, though
8 migration tilt and penetration are not seen as significant
9 issues, they have potential, the potential, to lead to more
10 serious problems; and Number 4, a fractured arm or leg of a
11 filter can result in complications.

09:05AM

12 Did I read those correctly, sir?

13 A. Yes.

14 Q. And then the solution, a filter that meets these needs will
15 reduce the number of reported complaints, Number 2, create more
16 confidence in physicians; Number 4, provide patients an
17 improved filter experience. I may have said Number 4. Number
18 3 is provide patients an improved filter experience; and Number
19 4, capture more competitive market shares.

09:05AM

20 Did I read that correctly?

09:05AM

21 A. Yes.

22 Q. Sir, would you agree with me that if the solution to some
23 of these complications could be reduced by 78 percent by Bard
24 making design changes to its filter, do you think that Bard
25 should do that? Yes or no?

09:05AM

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1 A. It depends on what those were.

2 Q. You can't answer -- well, let me, again, if Bard could
3 reduce the complications that are described here by 78 percent,
4 should Bard do that? Yes or no?

5 A. Potentially.

09:06AM

6 MR. LOPEZ: 1950, please, Gay. Exhibit 1950.

7 BY MR. LOPEZ:

8 Q. You are only going to see this for the time being, Mr.
9 Carr. Do you recognize this document?

10 A. Yes.

09:06AM

11 Q. Were you at this meeting?

12 A. Yes, I was.

13 Q. Is this a summary of the meeting?

14 A. Yes.

15 MR. LOPEZ: Your Honor, I'd like to offer 1950 into
16 evidence at this time.

09:06AM

17 THE COURTROOM DEPUTY: I show that in on the 15th.

18 THE COURT: We show that as admitted.

19 MR. LOPEZ: Okay.

20 MR. NORTH: There are some redaction issues but
21 subject to those, no objection.

09:06AM

22 THE COURT: Actually, I don't show it in evidence,
23 Traci.

24 THE COURTROOM DEPUTY: I will check. I show May 15.

25 THE COURT: I will admit it even if it has already

09:07AM

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1 been admitted but subject to redaction. I assume you are
2 agreeable to working out redaction?

3 MR. LOPEZ: We'll work that out, Your Honor, yes.

4 BY MR. LOPEZ

5 Q. Okay, sir. What's an IVC -- an IVC focus group is where
6 you bring experts to a meeting whose advice you seek about
7 various issues dealing with your products. Right?

09:07AM

8 A. Not issues, just a group of physicians we bring to talk
9 about filter usage. Yes.

10 Q. Dr. Rogers, do you know who Dr. Rogers is?

09:07AM

11 A. I do.

12 Q. What is Dr. Rogers' specialty?

13 A. He's a trauma surgeon.

14 Q. And Dr. Trerotola, is he an interventional radiologist?

15 A. Yes, he is. I can't see it anymore. Sorry.

09:07AM

16 Q. Okay. And there are a number of doctors here who basically
17 you sat in a room with them and got their advice about risks
18 and their tolerance for certain risks about IVC filters?

19 A. Yes.

20 Q. That's a fair characterization of this?

09:08AM

21 A. Partially, yes.

22 Q. And one of the doctors thought the fracture rate should be
23 one in 10,000. True?

24 A. He would prefer it, yes.

25 Q. And you were at this meeting?

09:08AM

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1 A. Yes.

2 Q. And you went to this meeting so you could get good advice
3 from people who were physicians that were potentially -- who
4 could potentially be using or were using Bard IVC filters.
5 True?

09:09AM

6 A. I don't know if they all were, but yes.

7 Q. Sir, would you agree that the Asch study does not support
8 that either the Recovery or the G2 was appropriate for a
9 permanent use?

10 A. No.

09:09AM

11 MR. LOPEZ: Gay, can I see the deposition, December
12 19, 2013 deposition of Mr. Carr. Page 154, Lines 8 through 14.

13 BY MR. LOPEZ:

14 Q. Do you see that, Mr. Carr?

15 A. Yes.

09:09AM

16 Q. May I publish this to the jury, Your Honor?

17 THE COURT: No. It's not an exhibit.

18 MR. LOPEZ: Okay.

19 BY MR. LOPEZ:

20 Q. Sir, on that date, you were asked: It's your testimony
21 that the Asch study supports the contention by Bard that the
22 Recovery and G2 devices are appropriate for permanent use.
23 True? Your answer was no. And as a matter of fact, after Mr.
24 North objected you repeated no.

09:09AM

25 That's what you testified to in 2013. Correct?

09:10AM

5-18-18-MD 15-2641-Jones v Bard-Jury Trial-Day 4-A.M.-Carr-Direct

1 A. It says "partially" in the next paragraph.

2 Q. Sir, is it your testimony that retrievable filters should
3 be at least as safe and effective as permanent filters?

4 A. They are safe and effective.

5 Q. Could I have Mr. Carr's deposition, October 25, 2013, Page
6 165.

09:10AM

7 "QUESTION: And would you agree that the retrievable
8 filters ought to be at least as safe as the permanent ones?

9 "ANSWER: Yes."

10 That's testimony you gave under oath in October of
11 2013. True?

09:10AM

12 A. Yes.

13 Q. Thank you.

14 MR. LOPEZ: Your Honor, no further questions. Pass
15 the witness.

09:11AM

16 THE COURT: All right. Cross-examination?

17 MR. NORTH: Your Honor, we will reserve our
18 questioning of Mr. Carr until our case in chief.

19 THE COURT: All right. You can step down, Mr. Carr.

20 THE WITNESS: Thank you.

09:11AM

21 MR. COMBS: Your Honor, the plaintiff at this time
22 calls Dr. Derek Muehrcke.

23 THE COURT: All right. Do you have a copy of his
24 report? I didn't mention this this morning, but I think it
25 would be helpful whenever we're calling an expert -- hold on

09:12AM

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1 right here, sir -- to have a copy of the report if issues come
2 up about disclosure.

3 MR. COMBS: We'll get that for you, Your Honor.

4 THE COURT: That's fine.

5 MR. COMBS: I'd give you mine but you wouldn't want
6 it. It's got some notes on it.

09:12AM

7 THE COURTROOM DEPUTY: Sir, if you will raise your
8 right hand.

9 (The witness was sworn.)

10 THE COURTROOM DEPUTY: Could you please state and
11 spell your name for the record?

09:12AM

12 THE WITNESS: Derek Muehrcke. D-E-R-E-K, Muehrcke,
13 M-U-E-H-R-C-K-E.

14 THE COURT: Let's have you restate that when you get
15 to the mic so the jury can hear it.

09:13AM

16 MR. COMBS: Your Honor, may I introduce myself to the
17 jury?

18 THE COURT: Sure.

19 MR. COMBS: Ladies and Gentlemen of the jury, my name
20 is Lincoln Combs. I'm with the firm of Gallagher & Kennedy. I
21 represent the plaintiff, Doris Jones, along with the rest of
22 the trial team you have already met.

09:13AM

23 THE COURT: Dr. Muehrcke, can you spell your name
24 again?

25 THE WITNESS: Yes.

09:13AM

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1 My name is spelled M-U-E-H-R-C-K-E.

2 DEREK MUEHRCKE, M.D.

3 a witness herein, having been first duly sworn by the clerk to
4 speak the truth and nothing but the truth, was examined and
5 testified as follows:

6 DIRECT EXAMINATION

7 BY MR. COMBS:

8 Q. Good morning, Dr. Muehrcke.

9 A. Good morning.

10 Q. You have already told the jury your name and spelled it for 09:13AM
11 them a couple times. Why don't you tell them what you do for a
12 living.

13 A. I am a cardiothoracic and vascular surgeon. I live in
14 Jacksonville, Florida. And my practice involves open heart
15 surgery, thoracic surgery, and vascular surgery in equal 09:13AM
16 thirds.

17 Q. You are a heart surgeon?

18 A. Yes.

19 Q. And as part of your work as a cardiothoracic surgeon, do
20 you operate on the main blood vessels in the body? 09:14AM

21 A. Yes, I do.

22 Q. Do you hold any board certifications, Dr. Muehrcke?

23 A. I'm board certified in thoracic surgery.

24 Q. Explain to the jury, if you could, what that means to be
25 board certified? 09:14AM

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1 A. To be board certified in thoracic surgery is the highest
2 level of certification available for cardiothoracic surgeons.
3 It involves having completed a general surgical training
4 program and then a cardiothoracic fellowship and passing exams
5 along the way. And I have actually recertified twice for my
6 certification, which is due every 10 years.

09:14AM

7 MR. COMBS: Your Honor, I have a copy if I may
8 approach.

9 THE COURT: Yes. Please.

10 BY MR. COMBS:

09:14AM

11 Q. And how long have you been board certified, Dr. Muehrcke?

12 A. 24 years.

13 Q. And if you could kind of briefly explain to the jury your
14 training and background and how you -- your education and your
15 work that you pursued to become a cardiothoracic surgeon.

09:15AM

16 A. I went to school for 17 years after high school. I went to
17 a seven-year college medical school program and then
18 matriculated to Harvard where I did my general surgical
19 residency program. I had an opportunity to spend two years in
20 Great Britain as part of the National Health Care Service.

09:15AM

21 I came back to San Francisco and did a year of
22 research at the -- bench research at the Cardiovascular
23 Research Institute and went back to Boston to finish my fourth
24 and fifth year. And then I stayed on to do my cardiothoracic
25 surgery training and then I stayed on at Harvard to do my

09:15AM

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1 congenital heart surgery at Boston Children's.

2 Q. And at some point in that training did you do some clinical
3 research as well?

4 A. Yes, I did. I did a year of -- well, I did bench research
5 for a year in San Francisco, but I have also done a lot of
6 clinical research as far as looking at patients. And I think I
7 have over 40 publications.

09:16AM

8 Q. But you have done some bench testing in your career?

9 A. Yes, I have done bench testing. Yes.

10 Q. Where do you currently practice, Doctor?

09:16AM

11 A. In St. Augustine, Florida, south of Jacksonville. I'm in
12 group of eight cardiac surgeons and five vascular surgeons.

13 Q. Do you hold any positions at the hospitals in your area?

14 A. Yes. I'm one of the founding members of our group, and I'm
15 the chairman of the Department of Cardiothoracic and Vascular
16 Surgery at Flagler Hospital.

09:16AM

17 Q. And you are charging the plaintiff a fee to be here today,
18 correct?

19 A. Yes, I am.

20 Q. What is your fee?

09:16AM

21 A. Well, my fee for the trial is \$7,000. I charge \$650 an
22 hour to review articles. I do have a staff back in my office
23 that I need to pay and light bills to pay and also lose
24 opportunity to earn income when I'm here. So I do have to
25 charge to come out here.

09:17AM

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1 Q. And how much would you say you have charged the plaintiff,
2 total, in this case not counting your fee to come out here to
3 testify?

4 A. The total is going to be probably close to 15,000. I'd
5 have to look at it. I don't know exactly. I know Mr. North
6 deposed me along with four other cases at one time, and I think
7 he paid me -- he paid me \$4,200. So I think it would be \$950
8 that should go towards that deposition and then probably 12
9 hours of work and then the \$7,000 on top. So probably about
10 \$15,000.

09:17AM

09:17AM

11 Q. I want you to just, if you could, give the jury some
12 background on the venous system and the issues that IVC filters
13 are implanted in patients to prevent.

14 A. Sure. So arteries take the blood away from the body and
15 bring it to the organs, and the veins bring it back to the
16 heart. The major artery off the heart is the aorta, and the
17 first arteries off that are the coronary arteries which supply
18 the heart with the blood supply. And the aorta comes up and
19 goes off the arms, across the ascending aorta to the left arm,
20 and they go down below the diaphragm and they give a blood
21 supply to the kidneys and then they perfuse the legs.

09:18AM

09:18AM

22 And the matching system which returns the blood to the
23 body is the venous system. And the venous system kind of
24 mirrors the distribution or the anatomy of the arterial system
25 but it returns blood products back to the heart. And then the

09:18AM

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1 whole system is a kind of in series system where the blood goes
2 into the heart, the right heart beats, puts the blood into the
3 pulmonary circulation. There the blood gets oxygenated, takes
4 out carbon dioxide, and then goes to the left heart which
5 ejects it under a much higher pressure to the body.

09:19AM

6 Q. And I presume as part of your work you are familiar with
7 and probably do procedures on the vena cava?

8 A. Yes.

9 Q. Describe the vena cava to the jury and its importance to
10 this circulatory system you have just described.

09:19AM

11 A. Well, the vena cava is a dynamic organ. It's thin-walled,
12 thinner than its adjacent arterial system. It's the blood
13 supply to the heart and anything which is caught in the venous
14 system, such as a clot in the leg, will go through that system
15 to the heart and to the lungs.

09:19AM

16 Q. Would you describe the vena cava as dynamic?

17 A. Yes. It's a very dynamic system. It has the capacity when
18 people are fluid overloaded to become quite large. And when
19 people are volume depleted or bleeding or dehydrated, the vena
20 cava will become smaller. So it has a kind of a capacitance to
21 hold extra fluid if needed. But it changes shape and is
22 dynamic and can be compressed from organs from the outside or
23 manipulation of the abdomen. It's very dynamic.

09:19AM

24 Q. And you told us a minute ago that you conducted what's
25 called bench testing in your career. There's been some

09:20AM

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1 evidence in this case that Bard conducted bench testing of its
2 IVC filters using sausage casing inside of PVC pipe to mimic
3 the environment of the vena cava. Are there any similarities
4 between sausage casing and the human IVC?

5 MR. NORTH: Your Honor, objection. This is outside
6 the scope of his report.

09:20AM

7 THE COURT: Where is this in the report?

8 MR. COMBS: It's not in the report, Your Honor, but he
9 has testified to it before.

10 THE COURT: In a deposition?

09:20AM

11 MR. COMBS: No, Your Honor.

12 THE COURT: Well, let's talk about it at sidebar for
13 just a minute.

14 If you want to stand up, Ladies and Gentlemen.

15 (Discussion was had at sidebar out of the hearing of
16 the jury:)

09:20AM

17 THE COURT: Was it in trial?

18 MR. COMBS: It was in trial. There was never an
19 objection. I literally copied the transcript into my outline.

20 MR. NORTH: I just don't recall.

09:21AM

21 THE COURT: If it was said in the previous trial
22 without objection, do you have an objection now?

23 MR. NORTH: No.

24 THE COURT: All right. Go ahead.

25 (In open court.)

09:21AM

5-18-18-MD 15-2641-Jones v Bard-Jury Trial-Day 4-A.M.-Muehrcke-Direct

1 THE COURT: Thank you, Ladies and Gentlemen.

2 MR. COMBS: Should I reask, Your Honor?

3 THE COURT: Yes.

4 BY MR. COMBS:

5 Q. The question was about bench testing using the sausage
6 casing in PVC pipe to mimic the dynamics of the vena cava.

09:21AM

7 Are there any similarities between sausage casing in
8 PVC pipe and the human IVC?

9 A. I would think they would act very differently.

10 Q. And are you familiar with inferior vena cava blood filters
11 or what we have been calling IVC filters?

09:21AM

12 A. Yes, sir.

13 Q. Do you use them in your practice?

14 A. Yes, I do.

15 Q. And have you implanted Bard IVC filters in your career?

09:22AM

16 A. Yes, I have implanted every iteration of the Bard filters.

17 Q. And describe those the Bard filters that you are familiar
18 with.

19 A. I have implanted the Simon Nitinol Filter. The first
20 optional or retrievable filter was the Recovery Filter, which
21 was released nationally in 2004. The next filter was the G2,
22 or second generation. And there was another form of that
23 called the G2X, which had a hook on it to make it easier to
24 retrieve the filter.

09:22AM

25 And the next filter was the Eclipse Filter which Ms.

09:22AM

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1 Jones had in her. The next iteration was the Meridian Filter,
2 and then the final iteration is the Denali Filter. Six
3 different filters.

4 Q. And I want to focus on the G2, G2X, and Eclipse. How were
5 those distinguished, or maybe a better way to ask it is, how
6 was the Eclipse different than the G2X and G2?

09:23AM

7 A. How is the Eclipse? The Eclipse has a electropolishing to
8 the surface of the G2X. It's the same dimensions, same wire
9 width, same -- basically the same filter except it's
10 electropolished. And that was done in an effort to help
11 prevent fractures.

09:23AM

12 Q. Is the Eclipse functionally, from your perspective as a
13 surgeon who implants the filters, the same as a G2?

14 A. Yes, it is.

15 Q. What filters do you currently use?

09:23AM

16 A. I use the Argon Option Filter.

17 Q. Have you, in the past, used other filters besides Bard
18 filters?

19 A. Yes, I have used --

20 Q. And the Argon?

09:24AM

21 A. I have used the Argon. I have used the Trapease, OptEase,
22 Cook, Celect Filters.

23 Q. Do you currently use Bard filters?

24 A. I do not use Bard filters.

25 Q. Why not?

09:24AM

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1 A. I do not use Bard filters after I had an opportunity to see
2 the internal documents that Bard had showing that there have
3 been problems with their filters over a long period of time.
4 And those problems were not relayed to physicians in their
5 marketing material or through their representatives so that we
6 could talk to our patients and give them an honest estimate of
7 what their risk factors were when they had these filters
8 placed.

09:24AM

9 I personally felt betrayed by that. I was a loyal
10 user of Bard at the time. Our interventional radiologist in my
11 hospital stopped using the Bard device, but I stuck with them.
12 And when I had an opportunity to kind of see the internal
13 documents and see that there were problems known for a long
14 time, and that when these problems were dealt with, they were
15 never studied in humans. They were just sold. They were put
16 back into humans to see how they did without any real testing
17 with them. And I have a moral and ethical issue with that.

09:25AM

09:25AM

18 Q. And in addition to implanting IVC filters, have you removed
19 them?

20 A. I have removed them, yes.

09:25AM

21 Q. In private practice, have you been provided with brochures
22 on the Bard IVC filters?

23 A. Yes, we have.

24 Q. Have you seen the brochure for the Eclipse permanent
25 filter?

09:26AM

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1 A. Yes, I have.

2 MR. COMBS: Gay, if you could please pull up 4428.

3 BY MR. COMBS:

4 Q. And Dr. Muehrcke, do you recognize this as an Eclipse
5 brochure that was provided to you by Bard?

09:26AM

6 A. Yes, I do.

7 Q. Go to the second page, please.

8 Does this Exhibit 4428 accurately represent the way in
9 which this filter was marketed to you as a physician for
10 implanting the filter?

09:26AM

11 A. Yes, it does.

12 MR. NORTH: Your Honor, objection. Outside the scope
13 of his report.

14 THE COURT: Is this in the report?

15 MR. COMBS: I think he just testified -- I'm not
16 really asking for an opinion, I don't think.

09:26AM

17 THE COURT: Is it in the report?

18 MR. COMBS: I will withdraw the question, Your Honor.

19 THE COURT: All right.

20 MR. COMBS: But I would like to move this document
21 into evidence at this time.

09:26AM

22 MR. NORTH: No objection, Your Honor.

23 THE COURT: Hold on just a minute.

24 Exhibit 4428 is admitted.

25 MR. COMBS: May I publish the exhibit to the jury,

09:27AM

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1 Your Honor?

2 THE COURT: Yes.

3 BY MR. COMBS:

4 Q. And Dr. Muehrcke, as a doctor that implanted the Eclipse
5 Filter did you have certain expectations as to how that filter
6 would perform after it was implanted?

09:27AM

7 A. Yes, I did.

8 Q. And what were those expectations when you used the G2 and
9 Eclipse filters?

10 A. I would expect an inferior vena cava filter to stay in
11 place and catch clots from the legs and prevent them from going
12 to the lungs and to the heart.

09:27AM

13 Q. Would other physicians like yourself have the same
14 expectations of the G2 and Eclipse Filters?

15 A. Yes. That's why they are placed.

09:28AM

16 Q. Why would it be important that the Eclipse Filter not move
17 or fracture, stay in place where it was implanted?

18 A. Well, it's important because if it moves or migrates or
19 tilts, it will be less effective in catching clots. And if it
20 were to disintegrate or fall apart or embolize, it can cause
21 danger to the rest of the body and also be noneffectual.

09:28AM

22 Q. And at some point in your use of Bard IVC filters, did you
23 start to see complications with those filters?

24 A. I have seen complications with Bard filters, yes.

25 Q. And what kind of complications have you seen with

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1 particularly the G2 and Eclipse line of filters?

2 A. Well, I have seen tilting of filters. I have seen
3 perforations. I have seen fractures. I have not seen -- with
4 the G2 filters I have not seen any cranial migration problems
5 or towards the heart but mostly tilting, perforation, fracture,
6 embolization.

09:29AM

7 Q. And the problems with migration, we have heard a lot of
8 talk in this case about cephalad versus cranial -- cephalad
9 versus caudal. You are obviously familiar with those terms?

10 A. Yes.

09:29AM

11 Q. Which kind of problems with migration did you see with the
12 G2 and Eclipse Filters?

13 A. The type of problems which the G2 Filter presented, and I'm
14 not so sure I understand exactly why the filter developed this
15 problem, but it developed a problem where it would fall
16 backwards, kind of caudally, towards -- caudal means toward
17 your tail. And we have a remnant of a tail in human beings,
18 the coccyx. But it would cause the filter to migrate in an
19 inferior caudal fashion and that sets up an entire cascade of
20 events due to the instability of the filter.

09:29AM

09:30AM

21 Q. And you talked about several different types of
22 complications; migration, tilt, fracture. What's the
23 relationship in your experience between those complications
24 with the G2 and Eclipse Filters?

25 A. Well, I think that it all starts out with a bit of

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1 instability in the inferior vena cava where the filter falls
2 back a little bit on one side, or can fall back a lot. And
3 that sets up a situation where you can have arms penetrating
4 the inferior vena cava; you can have the nose cone touching the
5 side of the vena cava; or you can have abnormal stresses put on 09:30AM
6 the filter itself as I believe occurred in Mrs. Jones' case.
7 And it can put abnormal stresses on the filter such that the
8 wire in these filters are being flexed. And if you flex a
9 piece of metal long enough, you will have fatigue and it will
10 break off. And given the design of the Bard filter being a 09:31AM
11 cone-shaped device, once you have a fracture that fracture is
12 not going to be stable. It's going to blast off and go
13 someplace.

14 And, I hasten to add that the efficiency of the filter
15 in catching clots is obviously reduced if it's missing arms and 09:31AM
16 legs and is tilted.

17 Q. So do these complications occur together, or are they more
18 likely to occur separately where a patient will only have one
19 complication at a time?

20 A. In the Bard filters they seem to occur in clusters. They 09:31AM
21 seem to occur together. Once the backward tilting and
22 migration occurs and the tilting, it sets up kind of a domino
23 effect.

24 Q. What's the significance of this domino effect on the
25 filters for you, as a clinician, in implanting them in 09:32AM

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1 patients?

2 A. Well, it represents a setup for filter fracture,
3 inefficiency of the filter. The benefit is lost of the filter
4 clinically. And it's also dangerous to the patients.

5 Q. Fracture can occur as part of the domino effect?

09:32AM

6 A. Correct. Fractures can occur.

7 Q. What's the significance for the patient when a fracture
8 occurs?

9 A. Well, when a fracture occurs, the filter fractured element
10 can stay locally, or it can go to the heart or it can go to the
11 lungs or it can go to other parts of the body. And then --
12 that's kind of a new set of problems which we're not used to
13 dealing with before. And those things are not meant to be in
14 organs like the liver or the lungs or the heart. And if you
15 get into a dynamic organ which moves, it can be a problem down
16 the line. It can take years for that problem to occur.

09:32AM

09:33AM

17 Q. As part of your work as an expert in this case, have you
18 had an opportunity to review internal Bard documents?

19 A. Yes, I have.

20 Q. And if you could tell the jury, you know, about how many
21 pages of Bard documents have --

09:33AM

22 A. I have read hundreds of Bard's documents, and I have read
23 thousands of pages of depositions taken in this litigation.

24 Q. And before your involvement as an expert witness in this
25 case, when you were just a treating physician, had you ever had

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1 an opportunity to review any of these internal Bard documents?

2 A. No. Those documents are not made available to physicians.

3 Q. And I think you mentioned you have had an opportunity to
4 review the testimony of current and former Bard employees?

5 A. Yes, I have.

09:34AM

6 Q. And are those part of the basis for your opinions in this
7 case?

8 A. Yes, they are.

9 Q. And you have also had a chance to review Mrs. Jones'
10 medical records, I believe?

09:34AM

11 A. Yes, sir.

12 Q. And do those records include the records for the
13 implantation of her Eclipse Filter?

14 A. Yes.

15 Q. And imaging she's received of the filter?

09:34AM

16 A. Yes.

17 Q. And the records for when her filter was removed as well?

18 A. Correct.

19 Q. When did Doris Jones receive her Eclipse Filter?

20 A. It was in 2010.

09:34AM

21 Q. And I believe the implanting surgeon was Dr. Avino. Does
22 that sound right?

23 A. Yes.

24 Q. Do you believe that the Eclipse Filter was appropriately
25 placed in Ms. Jones?

09:35AM

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1 A. Yes. She had a problem with recurrent deep venous
2 thrombosis where her legs would swell and was undergoing -- she
3 had two gastric surgeries. She had one before and was
4 requiring a second gastric surgery and she could not be
5 anticoagulated. So the filter was put in place to protect her
6 from a clot going from her legs to her lungs. I think that's
7 an appropriate use of the filter.

09:35AM

8 Q. And based on your review of the records of the implant
9 procedure and everything else, was the filter implanted
10 properly?

09:35AM

11 A. I believe so.

12 Q. Was Doris Jones indicated for a permanent filter at the
13 time she was implanted with the Eclipse Filter in 2010?

14 A. Yes. The indications from the implanting physician was
15 that this filter would be permanent; would not be removed
16 because she had gastrointestinal bleeding every time she was
17 placed on anticoagulants so she could not be anticoagulated
18 and, therefore, she's going to need the filter for the rest of
19 her life.

09:36AM

20 Q. And what imaging have you reviewed of Mrs. Jones?

09:36AM

21 A. I have reviewed her chest CT scans and her chest x-rays of
22 2013, 2015, and 2010.

23 Q. And what did the 2013 chest X-ray show?

24 A. It looked normal.

25 Q. In regards to the filter?

09:36AM

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1 A. It looked normal.

2 Q. Filter was in place in 2013?

3 A. Yes.

4 Q. And then what about in April 2015 as far as the filter,
5 what did that imaging show?

09:36AM

6 A. Well, the CT scan showed that there's a fragment of her
7 inferior vena cava filter in her right mid-lung zone.

8 Q. And if you could explain to the jury what happened with
9 Mrs. Jones' Eclipse Filter in 2015?

10 A. She developed a complication of the inferior vena cava
11 filter where one of the arms fractured and migrated up the
12 inferior vena cava through the heart, through the pulmonary
13 artery into the right lung and was caught as soon as the vessel
14 narrowed down into an area that could not pass.

09:37AM

15 MR. COMBS: Gay, if you could please locate Exhibit
16 4568 and show it to Dr. Muehrcke.

09:37AM

17 BY MR. COMBS:

18 Q. Doctor, this is an animation that depicts the fracture of
19 Doris Jones' IVC filter?

20 MR. NORTH: Your Honor, I'm going to object. None of
21 this was in his report. He did not discuss this then.

09:38AM

22 THE COURT: What's your response, Mr. Combs?

23 MR. COMBS: He certainly talked about what happened.
24 He already talked here without objection about what happened
25 with Ms. Jones' IVC filter.

09:38AM

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1 THE COURT: Is this animation part of his report?

2 MR. COMBS: No, Your Honor. It was created for trial.

3 THE COURT: Let's talk at sidebar for a minute.

4 Go ahead and stand up, Ladies and Gentlemen.

5 (Discussion was had at sidebar out of the hearing of

09:38AM

6 the jury:)

7 THE COURT: Rule 26(a)(2)(B) requires disclosure of

8 all exhibits an expert would use during trial. What is your

9 response that?

10 MR. COMBS: Two responses to that, Your Honor. Number

09:38AM

11 one, this is an animation. It just helps him explain his

12 opinions, explains it to the jury. Number two, in Booker we

13 did the same thing. I don't believe there was any objection to

14 any animations that Dr. Muehrcke explained to the jury.

15 THE COURT: But you agree it was not disclosed as

09:39AM

16 parts of his report?

17 MR. COMBS: An animation? No.

18 THE COURT: What's the basis for your objection?

19 MR. NORTH: Your Honor, it was not disclosed as part

20 of his report. It's one thing for them to have shown it in

09:39AM

21 opening where lawyers were not presenting evidence or talking

22 about it. But then to have this expert witness, I don't know

23 what sort of detail or opinion he's going to give about it. It

24 should have been disclosed in a report if the expert is going

25 to talk about.

09:39AM

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1 THE COURT: Show me the report disclosures that you
2 think cover this, please.

3 MR. COMBS: Your Honor, it talks about the CT scans
4 where they show the filter.

5 THE COURT: Where are you?

09:40AM

6 MR. COMBS: On page -- I'm sorry.

7 MR. ROGERS: It's not enumerated.

8 MR. COMBS: Case specific opinions above that talks
9 about CT scans that are reviewed, and then he talks about what
10 the CT scans showed. And he talks about her medical course and
11 this is all part of that.

09:40AM

12 THE COURT: Is there anything in here that describes
13 how the fragment got from the filter to the lungs?

14 MR. COMBS: I don't believe it does, Your Honor.

15 THE COURT: The objection is sustained.

09:41AM

16 MR. COMBS: While we're here, Your Honor, there's
17 subsequent animation showed in opening as well showing the
18 removal of the filter, not of the fragment.

19 THE COURT: Is there going to be an objection to that?

20 MR. ROGERS: This is the removal of her filter? He's
21 never reviewed that. That's not disclosed in his report.

09:41AM

22 MR. COMBS: Well, he certainly has reviewed the
23 reports, the medical records of the removal.

24 THE COURT: Where is it in his report?

25 MR. COMBS: That the filter was removed?

09:41AM

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1 THE COURT: Well, The description of how it was
2 removed, which is what I understand the animation will show.

3 MR. COMBS: More importantly --

4 THE COURT: Hold on.

5 MR. COMBS: There's not a detailed description of
6 filter removal procedure. It's a general filter removal.

09:41AM

7 THE COURT: The objection is sustained.

8 MR. COMBS: Okay.

9 (In open court.)

10 THE COURT: Thank you, Ladies and Gentlemen.

09:42AM

11 MR. COMBS: Your Honor, may I approach the witness to
12 hand something to draw on?

13 THE COURT: You mean to create something for the jury
14 to see?

15 MR. COMBS: Correct.

09:42AM

16 THE COURT: Yes, you can.

17 THE WITNESS: Do you have any crayons?

18 MR. O'CONNOR: Yeah. Green.

19 THE WITNESS: Actually, probably show up better.

20 MR. COMBS: That would be better.

09:43AM

21 BY MR. COMBS:

22 Q. Dr. Muehrcke, why don't you, if you could, briefly and
23 somewhat, obviously, not to scale or in great detail, but draw
24 for the jury a quick diagram of the vena cava and the heart and
25 the pulmonary system so you can show how the filter is --

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1 filter fragment traveled to where it ultimately landed in Mrs.
2 Jones.

3 MR. NORTH: Your Honor, I'm going to object again.
4 It's trying to get the same --

5 THE COURT: Isn't that the issue we just discussed at
6 sidebar?

09:43AM

7 MR. COMBS: He can't create an exhibit here.

8 THE COURT: It's not in his report, so the objection
9 is sustained.

10 MR. COMBS: Fair enough, Your Honor.

09:44AM

11 I will take my pen back if I may, Your Honor.

12 THE COURT: Yes.

13 BY MR. COMBS:

14 Q. Where did the fragment that broke off of the Eclipse
15 Filter, where did it ultimately lodge in Mrs. Jones' body?

09:44AM

16 A. So the fragment came off of the inferior vena cava filter,
17 which is located below the renal veins and the inferior vena
18 cava. It broke off and went up the vena cava into the right
19 atrium. And then it went through the tricuspid valve into the
20 right ventricle.

09:44AM

21 MR. NORTH: Your Honor, I'm sorry. Objection. Same
22 thing.

23 THE COURT: I think the question was where it came to
24 rest. Is that right?

25 MR. COMBS: Correct, Your Honor.

09:45AM

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1 THE COURT: If you could just address that issue.

2 THE WITNESS: It came to rest in her right pulmonary
3 artery in the mid-lung zone.

4 BY MR. COMBS:

5 Q. And why did -- well, how did the imaging and the discovery
6 of this broken filter come about in April 2015?

09:45AM

7 A. Mrs. Jones presented to the hospital with light headedness
8 and bilateral arm pain. And one of the first studies they did
9 on her was to do a CT scan of her chest to see if they could
10 find out what was causing her symptoms.

09:45AM

11 Q. And what symptoms was she suffering at that time that you
12 relate to the broken piece of the IVC filter?

13 A. Well, I think the bilateral arm pain is a concern to me
14 that it may represent the filter fragment traveling through her
15 heart into the pulmonary artery.

09:46AM

16 Q. And that's a serious complication?

17 A. It's a serious complication. She's lucky, if lucky is the
18 right word, that it didn't stay in her heart which would be
19 very dangerous. But it managed to negotiate its way out of the
20 heart into the pulmonary arteries and stuck in her right
21 pulmonary artery.

09:46AM

22 Q. What did Mrs. Jones' doctors that were treating her at the
23 time do to help her with these problems?

24 A. Well, at the time they went in and they removed the damaged
25 or disintegrated inferior vena cava filter. They took a look

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1 at the fragment in her right pulmonary artery, and the
2 interventional radiologist, given her skill set, without having
3 experience removing fragments from the pulmonary artery thought
4 that the risk/benefit ratio was not in favor of removing that.
5 So they left it in her lung.

09:47AM

6 Q. And do you have any criticism or disagreement with any of
7 the decisions that her treating physicians made at the time
8 dealing with this fractured filter and fragment in her
9 pulmonary artery?

10 A. No. I think it was appropriate to remove her inferior vena
11 cava. It brings up the question, though, that is, you know,
12 does she need to have another filter inserted, a permanent
13 filter inserted.

09:47AM

14 Q. Was the filter that was removed, was it removed through an
15 open procedure?

09:47AM

16 A. No. It was removed through a percutaneous procedure.

17 Q. What does percutaneous mean?

18 A. Percutaneous means it's done through a needlestick with
19 wires and catheters as opposed to opening up her vena cava.

20 Q. So it's a cut through the skin into the vein?

09:47AM

21 A. Yes.

22 Q. Why was it so -- well, you touch on this a little bit. I
23 want you to tell the jury a little bit further why it was a
24 good idea for the interventional radiologist treating Mrs.

25 Jones at the time not to remove the fragment in her pulmonary

09:48AM

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1 artery?

2 A. Well, I mean, I think it would be best if that fragment
3 could ultimately be removed, because I think it's a danger to
4 her. But there are only a few people across the United States
5 or in the world, for that matter, who have the skill set of
6 removing these filter fragments by using special techniques
7 which are not -- they are more advanced techniques which are
8 not commonly used. And most interventional radiologists do not
9 have a lot of experience with them.

09:48AM

10 Q. What is your opinion about Mrs. Jones' treatment going
11 forward in regards to this fragment in her pulmonary artery?

09:48AM

12 A. As far as monitoring or --

13 Q. Well, what would you recommend that she do?

14 A. I would recommend that she go to a center like Stanford and
15 have that fragment removed so it's not a danger to her. And I
16 would -- until that happens, I would monitor her extremely
17 closely to make sure that that spike in her lung doesn't cause
18 a problem.

09:49AM

19 Q. And there's surgeons around the country, including a center
20 at Stanford, that specializes in these kinds of removals?

09:49AM

21 A. Yes. Dr. Kuo.

22 Q. In the meantime until she can have that type of procedure,
23 what would you recommend for her treatment and care?

24 A. I would tell her to be careful, to avoid any trauma to her
25 chest. The problem is that this, you know, spike is in a

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1 dynamic area. She breathes 16 to 20 times a minute. And she's
2 a breath away from having a problem, a death. And that could
3 be very serious. So I think that that thing should be removed
4 and she should be monitored. She cannot be anticoagulated. It
5 would be great if she could because I think that metal object
6 in her lung is clearly at risk for clotting off, because we put
7 wires in arteries and veins to make them clot off. That
8 abnormal serve surface is very thrombogenic, so to say. I
9 think she needs to be monitored very closely, and I would think
10 she should have that fragment removed.

09:50AM

09:50AM

11 Q. At the time that Mrs. Jones' Eclipse Filter was implanted,
12 what would be the expectations of a reasonable physician in
13 putting that in her as far as how the device would perform over
14 the rest of her life?

15 A. I think the implanting physician wanted it to be permanent,
16 to stay there forever. And one would expect it to stay in
17 place and not to fall apart and to catch clots if it need be.

09:50AM

18 MR. COMBS: Your Honor, I'd like to display Exhibit
19 2248, which I believe is in evidence.

20 THE COURT: You may.

09:51AM

21 MR. COMBS: Publish that to the jury, please, or put
22 it up, Gay, and Traci will publish.

23 THE COURTROOM DEPUTY: I did.

24 MR. COMBS: Thank you.

25 BY MR. COMBS:

09:51AM

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1 Q. Doctor, Exhibit 2248, is that a document that you have
2 reviewed before?

3 A. Yes.

4 Q. It's part of the bases for your opinions?

5 A. Yes.

09:51AM

6 Q. And I don't know that we have the pages numbered.

7 MR. NORTH: Your Honor, I'm going to object. This is
8 in violation of the Court's order of *Daubert*.

9 THE COURT: All right. We need to talk about that.

10 Sorry, Ladies and Gentlemen. You can stand up if you would
11 like.

09:52AM

12 (Discussion was had at sidebar out of the hearing of
13 the jury:)

14 THE COURT: Are you talking about Docket 9771?

15 MR. NORTH: Yes, Your Honor.

09:52AM

16 THE COURT: What page?

17 MR. NORTH: Beginning of Page 8. Well, discussion
18 begins, I'm sorry, on Page 7 at the bottom.

19 THE COURT: What's the ruling you think it violates?

20 MR. NORTH: This is the unacceptable analysis document
21 from Natalie Wong, and this Court ruled that he could not give
22 opinions about an unacceptable risk merely repeating
23 conclusions in the Wong report which is exactly what he's
24 doing.

09:52AM

25 THE COURT: Hold on just a minute.

09:53AM

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1 Tell me where you are going with that, Mr. Combs.

2 MR. COMBS: Your Honor, this came up in Booker and
3 there was a sidebar. I don't remember all the back and forth
4 but I believe you ultimately said he can testify if this was
5 true, what would your expectations be or how was information --

09:53AM

6 THE COURT: I don't remember Booker. What is it that
7 you --

8 MR. COMBS: I think it's what your Motion in Limine --
9 if Bard knew there was an unacceptable risk is that information
10 that physicians would have wanted to know?

09:53AM

11 THE COURT: Okay. Hold on just a minute.

12 Okay. I think the key is on Page 9 where I say Dr.
13 Muehrcke could opine as a treating physician who must make
14 decisions about IVC filter use; that Bard should have disclosed
15 any risks it found in its products that would be unacceptable
16 to doctors and patients. But he cannot opine that Bard filters
17 present an unacceptable risk unless he's got a basis for it,
18 which I don't think he does. So he can't repeat -- and I went
19 on to say he can't repeat the conclusions in the Wong report.
20 So tell me again what you are going to ask.

09:54AM

09:55AM

21 MR. COMBS: If Bard's filters demonstrated
22 unacceptable risk, was that something that physicians like
23 yourself would have wanted to know?

24 THE COURT: That looks to me like it's within my
25 order.

09:55AM

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1 MR. COMBS: Your Honor, I'm frustrated the rearguing
2 thing you have already ruled on in Booker. And I understand
3 you can't remember everything. I can't remember everything
4 that happened in Booker. What's the best way if this happens
5 again where they want to raise a new objection? This is
6 exactly what was shown to the jury, the witness went over in
7 Booker. Should I bring in a transcript of the sidebar?
8 Because they want to go back to the motion in limine and
9 reargue something you have ruled on.

09:55AM

10 THE COURT: This was a motion in limine for all of the
11 cases.

09:55AM

12 MR. COMBS: Exactly.

13 THE COURT: And I ruled on it.

14 MR. COMBS: Yeah.

15 THE COURT: I just decided that. But I am not going
16 to say that either side is unable to make objections that were
17 made in Booker. This is a new trial. I'm ruling on them as
18 they come up.

09:55AM

19 MR. COMBS: Understood. Procedurally what's the best
20 way to go Your Honor, look, you ruled -- because I can't go to
21 a docket entry. Should I bring a transcript?

09:56AM

22 THE COURT: No, because how I ruled there won't
23 necessarily control how I rule here. I'm going to do my best
24 to make my judgments in this trial.

25 MR. COMBS: Even on the exact exhibit, exact same line

09:56AM

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1 of questions?

2 THE COURT: Yeah. Otherwise, every objection we're
3 going to be searching for in that transcript to figure out how
4 I ruled. That's going to be impossible. And I'm going to use
5 my best judgment in this trial to make the rulings to
6 objections as --

09:56AM

7 MR. COMBS: That's fair, Your Honor. Now that I
8 understand, I understand.

9 THE COURT: Okay.

10 (In open court.)

09:56AM

11 THE COURT: Thank you, Ladies and Gentlemen.

12 BY MR. COMBS:

13 Q. Dr. Muehrcke, in Exhibit 2248, Page 20 here, there's a box
14 and a circle around some figures in a chart that talks about
15 unacceptable risk. Do you see that?

09:57AM

16 A. Yes, I do.

17 Q. If Bard's IVC filters, specifically the G2 Filter, had an
18 unacceptable risk, is that something you, as a treating
19 physician using G2 Filters and the filters after them like the
20 Eclipse Filter, that were the same design and performance as a
21 G2 Filter, is that information you would have wanted to know?

09:57AM

22 A. Absolutely.

23 Q. Why?

24 A. Because when I go to put a filter in the patient I have to
25 obtain an informed consent, and I have to tell them what the

09:57AM

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1 risk/benefits alternatives are in the procedure, and I try to
2 use the best filter for the patient. And if I'm not aware of
3 what the best filter is when I talk to the patient then I'm
4 really not giving them the information that they need to know
5 to make a decision about whether to have the filter or not.

09:58AM

6 Q. And Doctor, what was the subsequent Bard model that came
7 out that replaced the Eclipse?

8 A. The Meridian Filter came out, I think, in 2011.

9 Q. What was the difference between the Eclipse Filter and the
10 Meridian Filter?

09:58AM

11 A. Well, the Meridian Filter had the caudal anchors.

12 MR. NORTH: Your Honor, I'm sorry. I hate to object
13 but it's not within the report.

14 THE COURT: Show me where it is in the report.

15 MR. COMBS: I will, Your Honor.

09:58AM

16 THE COURT: I have got the report. Just point it out
17 to me.

18 MR. COMBS: Bottom of case-specific opinions regarding
19 Doris Jones. It goes on to the next page.

20 THE COURT: Hold on just a minute, please.

09:58AM

21 The objection is overruled.

22 BY MR. COMBS:

23 Q. What was the difference between the Eclipse Filter and the
24 Meridian Filter?

25 A. So the Meridian Filter was the next iteration of the Bard

09:59AM

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1 Filter after the Eclipse, and the caudal anchors were placed in
2 an effort to deal with the caudal migration problem, which was
3 found in the G2 Filter.

4 Q. Doctor, what is a differential diagnosis?

5 A. A differential diagnosis is a process that one goes through
6 to try to find out the cause of a problem or a disease state.

09:59AM

7 Q. And did you as part of your work in this case perform a
8 differential diagnosis to try to determine the cause of the
9 fracture of Mrs. Jones' Eclipse Filter?

10 A. Yes.

10:00AM

11 Q. And what was your conclusions?

12 A. In my conclusion I found no other source of why it should
13 fracture other than a slight tilt and fatigue and, you know,
14 fragment embolization.

15 Q. And what was the root cause of those failures?

10:00AM

16 A. I think it's the filter has an issue with, you know,
17 instability in the inferior vena cava and is prone to a cascade
18 of events with the slight caudal migration tilting and abnormal
19 stresses on the filter, which it doesn't seem to tolerate very
20 well. Those problems can occur early or they can occur years
21 and years later.

10:00AM

22 Q. The domino effect?

23 A. Yes, the domino effect.

24 Q. Did you identify any other reasonable causes of the
25 fracture of Mrs. Jones' Eclipse Filter?

10:01AM

5-18-18-MD 15-2641-Jones v Bard-Jury Trial-Day 4-A.M.-Muehrcke-Direct

1 A. I didn't see any other causes.

2 Q. And as a heart surgeon performing procedures on patients,
3 you presumably do some kind of risk/benefit analysis and go
4 over that with the patient before you perform the procedure?

5 A. Absolutely.

10:01AM

6 Q. Did you do a risk benefit analysis of the filter that Mrs.
7 Jones received in this case?

8 A. Yes, I did.

9 Q. And what were your conclusions from that risk/benefit
10 analysis?

10:01AM

11 A. I thought that the filter probably wasn't very beneficial
12 to her overall, and I think that the risk was probably greater
13 than the benefit to that filter. And that has to do with the
14 fact that the benefit of a filter really is realized if it
15 catches a clot. She has no evidence that this filter caught a
16 clot. And once the thing, you know, disintegrated and had a
17 filter fracture fragment go to her lung, that put her at
18 increased risk and also decreased the clot-trapping ability of
19 that filter. So I thought that in general, the risk of the
20 filter outweighed the benefits.

10:02AM

10:02AM

21 And parenthetically, I would also add that there's
22 never been a study to show that inferior vena cava filters save
23 lives. There's never been a study to show that.

24 Q. If Bard's filters, including the G2 and Eclipse Filters had
25 an unacceptable risk of failure, should they have ever been

10:02AM

5-18-18-MD 15-2641-Jones v Bard-Jury Trial-Day 4-A.M.-Muehrcke-Direct

1 placed on the market?

2 MR. NORTH: Objection, Your Honor. Outside of his
3 expertise and not within the report.

4 THE COURT: Where is it in the report?

5 MR. COMBS: It's on the top -- first paragraph on the
6 next page, right below where you just were.

7 THE COURT: The objection is overruled.

8 THE WITNESS: I'm sorry, could you please repeat the
9 question?

10 BY MR. COMBS:

11 Q. If Bard's IVC filters, specifically the G2 and Eclipse, had
12 an unacceptable risk of failure, should they have ever been
13 placed on the market?

14 A. Well, going back to the Recovery or the G2?

15 Q. Well, sure. Go back to the Recovery.

16 A. I think that the internal studies from Bard showed that the
17 Recovery Filter was not as good as the predicate device, the
18 Simon Nitinol Filter, even though it was portrayed to the FDA
19 that it was. And I think that it was adulterated.

20 MR. NORTH: Objection, Your Honor. Outside the scope.

21 THE COURT: I'm going to sustain that objection and
22 instruct the jury to disregard that answer.

23 BY MR. COMBS:

24 Q. Just focus on the G2 and Eclipse then.

25 A. And the G2 was a response to problems that the Recovery

5-18-18-MD 15-2641-Jones v Bard-Jury Trial-Day 4-A.M.-Muehrcke-Direct

1 Filter had. And they made changes to that filter and the
2 filter was released without a study, and they started having
3 problems with that filter. And there were unacceptable caudal
4 migration rates.

5 MR. NORTH: Objection, Your Honor. That's in
6 violation of the order.

10:04AM

7 THE COURT: I think you should re-ask the question and
8 just have a response to the question.

9 MR. COMBS: I will, Your Honor.

10 BY MR. COMBS:

10:04AM

11 Q. Dr. Muehrcke, given what you learned in this case, should
12 the G2 and Eclipse Filters been put on the market?

13 THE COURT: And you are asking his opinion as a
14 physician?

15 MR. COMBS: As a physician, correct.

10:05AM

16 THE WITNESS: No.

17 BY MR. COMBS:

18 Q. And if the G2 and Eclipse Filters hadn't been placed on the
19 market, Doris Jones would have never received an Eclipse
20 Filter?

10:05AM

21 A. That's correct.

22 MR. COMBS: Nothing further at this time, Your Honor.

23 THE COURT: All right. Cross-examination.

24 MR. NORTH: Yes, Your Honor.

25 ***

10:05AM

5-18-18-MD 15-2641-Jones v Bard-Jury Trial-Day 4-A.M.-Muehrcke-Cross

CROSS-EXAMINATION

BY MR. NORTH:

Q. Good morning, Dr. Muehrcke.

A. Good morning.

Q. I believe you told us a few minutes ago that you are charging \$7,000 a day?

A. \$7,000 for the trip out here.

Q. That's total for the entire trip or 7,000 for each day?

A. It's for today.

Q. And did you charge for yesterday?

A. I'm going to charge for yesterday, yes.

Q. 7,000 for yesterday?

A. No. No. It's going to be \$3,000 for the six-hour trip out here.

Q. And will you be charging for return travel to St. Augustine?

A. Tomorrow, no. I would not miss work tomorrow. Saturday.

MR. NORTH: If we could bring up Exhibit 2248 please and go -- I believe it's the second page, the chart. Keep going. Yes.

Your Honor, this has been admitted if we could publish this, please.

THE COURT: You may.

BY MR. NORTH:

Q. Dr. Muehrcke, you were asked some questions about this

—5-18-18-MD 15-2641-Jones v Bard-Jury Trial-Day 4-A.M.-Muehrcke-Cross—

1 particular exhibit. Are you aware that at the time this
2 analysis was performed at Bard there were only 13 reports of
3 caudal migration?

4 A. Using the MAUDE data?

5 Q. Look at this exhibit, if you would. The total number of
6 complaints. It lists 13 at the time this analysis was done,
7 correct?

10:06AM

8 A. That's what the report says.

9 Q. And you have no idea personally how many thousands of
10 filters had been sold at that time, do you?

10:07AM

11 A. I do not know how many filters were sold at that time.

12 Q. Let's talk a minute if we could, Doctor, about these
13 documents that you reviewed.

14 You claimed that you reviewed hundreds of Bard
15 documents. Is that correct?

10:07AM

16 A. That is correct.

17 Q. But at the time you issued your report in this case, you
18 only listed 24 Bard documents. Correct?

19 A. 24 documents, yes.

20 Q. So at the time you prepared your report you had only
21 reviewed 24 Bard documents. Is that correct?

10:07AM

22 A. That's correct. That's what I just said.

23 Q. And so then the hundreds you have read, you read after the
24 report?

25 A. No, I think those 24 documents have several pages to them.

10:07AM

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1 Q. So did you ever review any documents beyond those 24?

2 A. Yes, I have.

3 Q. Now, every single document you reviewed was presented to
4 you by the plaintiff's attorneys, correct?

5 A. That's correct.

10:08AM

6 Q. They selected which documents you were going to be given to
7 review?

8 A. Is that a question?

9 Q. Yes.

10 A. Yes.

10:08AM

11 Q. And you are aware of the fact that in the course of this
12 litigation, Bard has produced millions of documents. Correct?

13 A. That's correct.

14 Q. And yet at the time you -- well, at the time you prepared
15 your report, you gave the same opinions as we have heard that
16 you did in this courtroom today. Correct?

10:08AM

17 A. That's correct.

18 Q. And at the time you prepared that report to give the same
19 opinions you are giving in this courtroom today, you had read
20 24 Bard documents, all selected by the plaintiff's attorneys?

10:08AM

21 A. That's correct.

22 Q. Doctor, you told us earlier that you are a cardiothoracic
23 surgeon, correct?

24 A. That is correct.

25 Q. So as a part of your practice, you make decisions as to

10:09AM

—5-18-18-MD 15-2641-Jones v Bard-Jury Trial-Day 4-A.M.-Muehrcke-Cross—

1 whether patients should have heart surgery of some sort or
2 should not, correct?

3 A. That is correct.

4 Q. And I believe, as you have told us previously, you do not
5 believe that Mrs. Jones should have open heart surgery of any
6 sort to -- I'm sorry, not heart surgery -- any open surgical
7 procedure to remove the strut in her pulmonary artery, correct?

10:09AM

8 A. What I said is I would not do an open removal unless she
9 had a life-threatening complication.

10 Q. And, in fact, when you said you recommended she go to
11 Stanford that is a procedure that's performed percutaneously,
12 correct?

10:09AM

13 A. Exactly.

14 Q. Now, you still treat patients with inferior vena cava
15 filters, correct?

10:10AM

16 A. Yes.

17 Q. And so for those patients where you implant the filters,
18 you obviously believe they provide some sort of benefit,
19 correct?

20 A. Yes. I am very limited in the patients I put them in. I
21 think most implanting physicians are starting to implant a lot
22 less of those.

10:10AM

23 Q. And you are aware of the fact that all filters have
24 complications. Correct?

25 A. All filters can have complications.

10:10AM

5-18-18-MD 15-2641-Jones v Bard-Jury Trial-Day 4-A.M.-Muehrcke-Cross

1 Q. And all inferior vena cava filters can fracture, correct?

2 A. They can.

3 Q. And the medical literature contains dozens of articles
4 indicating fractures with all sorts of filters, correct?

5 A. That's correct.

10:10AM

6 Q. And all manufacturers' filters can fracture and have a
7 strut embolize or move to a patient's pulmonary artery,
8 correct?

9 A. They can. I think some are less likely to occur than
10 others based on design.

10:10AM

11 Q. But all filters can have that sequence of events occur with
12 them, correct?

13 A. I think that's possible.

14 Q. And there are reports in the literature of that happening
15 with all manufacturers' filters?

10:11AM

16 A. Yes.

17 Q. And all inferior vena cava filters can migrate, correct?

18 A. They -- yes. Some are much less likely than others based
19 on design.

20 Q. But all can migrate?

10:11AM

21 A. They can.

22 Q. And the literature is full of articles of all manufactures'
23 filters migrating?

24 A. Filters can migrate.

25 Q. And all IVC filters can penetrate, correct?

10:11AM

5-18-18-MD 15-2641-Jones v Bard-Jury Trial-Day 4-A.M.-Muehrcke-Cross

1 A. They can.

2 Q. Now, we have heard a lot about perforation or penetration.
3 But you did not mention that in your report. There was no
4 penetration seen with Ms. Jones' filter, correct?

5 A. I did not see any.

10:11AM

6 Q. And the tilt you saw was only 4 percent as you quantified
7 it, correct?

8 A. Four degrees.

9 Q. Four degrees?

10 A. Not percent, yeah.

10:11AM

11 Q. And that is, generally speaking, a very slight tilt.
12 Correct?

13 A. It's a very slight tilt.

14 Q. And you saw on the films that the filter had been
15 originally implanted at the level of L1, correct?

10:12AM

16 A. Correct.

17 Q. And just for L1, that's the lumbar disc Number 1?

18 A. Yes.

19 Q. And at the time the filter was removed, it was located at
20 the level of L1, correct?

10:12AM

21 A. Yes.

22 Q. Is there any evidence that this filter moved at all?

23 A. Well, I think to tilt, something has to give. You can't
24 have a tilt without something moving back or something moving
25 forward. There's got to be movement. There's got to be

10:12AM

—5-18-18-MD 15-2641-Jones v Bard-Jury Trial-Day 4-A.M.-Muehrcke-Cross—

1 instability. Yeah. The four-degree tilt is the evidence that
2 something happened.

3 Q. So you have seen evidence on the radiographic, or the
4 tests, of a four-degree tilt, but you don't see any evidence on
5 the films themselves that the filter actually moved downward,
6 do you? 10:13AM

7 A. Well, I think it's a micromovement. It's beyond the
8 resolution of the radiographic study.

9 Q. Well, isn't the answer to my question that you have not --
10 you are not able to see any evidence on the films itself that
11 the filter has moved downward? 10:13AM

12 A. I could not discern it, but something had to have moved for
13 the filter to tilt. Either one side went down or the other
14 side went up and the filter's associated with caudal migration
15 problems. So I think one side went back. It's a small amount. 10:13AM
16 It's not as egregious as some of the other cases we have been
17 involved in. But, yeah, I can't tell because it's beyond the
18 resolution of the study but it must have occurred for it to
19 have tilted.

20 Q. Tell us what a cavagram is? 10:14AM

21 A. A vena cavagram?

22 Q. Yes.

23 A. It's an injection of contrast into the vena cava to outline
24 the vena cava.

25 Q. And are those generally performed at the time of implant or 10:14AM

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1 explant retrieval of a filter?

2 A. They should be.

3 Q. Did you review the vena cavagram taken at the time of the
4 filter being implanted in Ms. Jones?

5 A. I don't recall it. I don't recall it.

10:14AM

6 Q. So you have seen no evidence that would allow you to
7 determine whether there was a four-degree tilt of that filter
8 in Ms. Jones at the time it was implanted, have you?

9 A. I think that the -- well, I think the filter was vertical
10 when it was implanted is my recollection of the implantation
11 films. And I think that there's a four-degree tilt in 2015.

10:14AM

12 And I think that the filter had to caudally migrate on one
13 side. There's no other explanation for that. When I saw her
14 implant films as I recall it looked like her filter was
15 implanted fine.

10:15AM

16 Q. So you have actually looked at films from the implant?

17 A. I believe I have seen films from her implant that show that
18 the filter was vertical when her implanting physician felt it
19 was implanted.

20 MR. NORTH: Could we bring up Exhibit 2453, please.

10:15AM

21 BY MR. NORTH:

22 Q. Do you recognize Exhibit 2453, Doctor?

23 A. Yes.

24 Q. Turn to Page 6, if we can. And this is a copy of the
25 report you prepared in this particular case. Correct?

10:16AM

5-18-18-MD 15-2641-Jones v Bard-Jury Trial-Day 4-A.M.-Muehrcke-Cross

1 A. Yes.

2 Q. And as a part of this report, you list all of the medical
3 records and various other materials that you have reviewed as a
4 part of your work in the case, correct?

5 A. Correct.

10:16AM

6 Q. And this is the list that contains the 24 Bard documents
7 that you reviewed, correct?

8 A. Yes, it does.

9 Q. And beginning on the bottom of Page 6, there is a list of
10 the radiographic films that you reviewed, correct?

10:17AM

11 A. Yes, sir.

12 Q. And the only film listed in -- well, first of all, Ms.
13 Jones had her filter implanted in August of 2010, correct?

14 A. Correct.

15 Q. The only listing is August 14, 2010 for that year, KUB.

10:17AM

16 What does that stand for?

17 A. It's abdomen -- flat plate of the abdomen.

18 Q. I'm sorry?

19 A. Flat plate of the abdomen.

20 Q. So that's not a cavagram, correct?

10:17AM

21 A. No. No.

22 Q. And that's not a chest X-ray or film, correct?

23 A. It's not.

24 Q. And that would not show the filter orientation, would it?

25 A. No. No.

10:17AM

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1 Q. You don't have listed here any film that you reviewed in
2 2010 when she had this implanted, do you?

3 A. I don't have them listed, no.

4 Q. So as you sit here today, are you certain you ever saw a
5 film of the implant?

10:18AM

6 A. You know, I stand corrected. I thought I saw the film.
7 Maybe I didn't see the implantation film but my understanding
8 from the implantation physician it was vertical. It's been a
9 long time since I made this report.

10 Q. So your only evidence that the filter was completely
11 vertical at the time of implant and did not have what you have
12 already said would be a very slight tilt in the nature of four
13 degrees, your only evidence of that is in the implant report,
14 correct?

10:18AM

15 A. Implant report.

10:18AM

16 MR. COMBS: Objection, Your Honor. Can we approach?

17 THE COURT: Yes.

18 You can stand up, Ladies and Gentlemen.

19 (Discussion was had at sidebar out of the hearing of
20 the jury:)

10:18AM

21 MR. COMBS: This is a line of questioning implying
22 that the filter was implanted incorrectly, which there's no
23 evidence of. There's no disclosure. There's no opinions on
24 this. He can't then come in and hint, hint that oh, you are
25 not sure that this was implanted properly without tilt.

10:19AM

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1 MR. NORTH: Your Honor, first of all, I'm making no
2 insinuation, nor would I, that a four-degree tilt at the time
3 of implant reflects anything on the part of the doctor. These
4 things are never perfectly vertical. What I'm trying to show
5 is that all this cascade of complications that he has alleged 10:19AM
6 did not occur here. Yes, there was a fracture. He's seen no
7 perforation. He can't not, I don't think, establish what's
8 really caudal migration. And I don't think he can establish
9 that it tilted after the time of implant and I think I'm
10 entitled to show that. 10:19AM

11 MR. COMBS: I think that's a subtle distinction that
12 would be lost in the jury that, oh, it wasn't below the
13 standard of care to put it in at a tilt. But that does happen.
14 I think that's unfair.

15 THE COURT: Well, when I was hearing it, my 10:19AM
16 understanding of the purpose of the questioning was to rebut
17 the doctor's testimony that at some time after implant it
18 tilted. That led to stress that caused the fracture. And I
19 think that's legitimate cross-examination on that point. I
20 have not heard questioning that suggests Dr. Avino made a 10:20AM
21 mistake. I think he was questioning this doctor's view that it
22 tilted four degrees after implant, and that's what caused the
23 problems.

24 MR. COMBS: I would just ask, Your Honor, that the
25 questioning be focused on that it was tilted four degrees or 10:20AM

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1 something insignificant, not put in wrong.

2 THE COURT: I think it has been.

3 MR. COMBS: Okay.

4 THE COURT: Yeah. I don't think he's gone beyond that
5 and I think it's fair cross-examination.

10:20AM

6 MR. COMBS: Thank you.

7 (In open court.)

8 THE COURT: Thank you, Ladies and Gentlemen.

9 BY MR. NORTH:

10 Q. So let me repeat the question, Dr. Muehrcke.

10:20AM

11 Since you did not see any films performed on Mrs.
12 Jones at the time of the implant, the only basis you have for
13 concluding that the filter was perfectly vertical after
14 placement is the narrative report by the implanting doctor in
15 his record. Correct?

10:21AM

16 A. After having had a chance to look at my report, I see that
17 there is a KUB of 8-14-10 and another X-ray from 8-04-13. And
18 I think that that shows the change in the tilt.

19 Q. What is the 8-14-10? You told us earlier right before we
20 took the break, I believe, that that would not have shown the
21 filter.

10:21AM

22 A. Well, the KUB will show the filter, oh, yes. It won't show
23 the filter next to the -- the orientation of the wall of the
24 inferior vena cava.

25 Q. Do you know when Ms. Jones' filter was implanted?

10:21AM

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1 A. It was in 2010.

2 Q. The KUB reviewed was dated August 14 of 2010, correct?

3 A. Yes.

4 Q. Are you aware of the fact that Ms. Jones' filter was
5 implanted after that date in August?

10:22AM

6 A. Yes, the 24th. My recollection is that I saw a change.
7 Perhaps it's on the X-ray of January 2012 but I thought there
8 was a change.

9 Q. But you saw no films at the time of implant?

10 A. Correct. The report is what I have that it was vertical
11 when it was inserted.

10:22AM

12 Q. There's not a great deal of discernible difference between
13 straight up vertical and four degrees, correct?

14 A. We said that before, yes. I agree.

15 Q. Well, let's think of a clock. And from on the hour, let's
16 say 10:00 to 10:15, that would be 90 degrees, correct?

10:22AM

17 A. I'm sorry, from 10:00 to 10:15?

18 Q. Yes. That arc of the circle would be 90 degrees?

19 A. Yes.

20 Q. So four degrees would be equivalent as opposed to 10:00
21 straight up and down more like 10:02, wouldn't it?

10:23AM

22 A. I agree. It's not a major tilt. I agree.

23 Q. And you are assuming that that four-degree or 10:02 tilt
24 would have caused caudal migration, but you can't see that on
25 any of the films?

10:23AM

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1 A. Well, that's the standard way that these things fail. But
2 there's no doubt that she has a filter fragment in her lung.
3 And that, you know, is pretty well documented.

4 Q. But I'm -- my question was, you can't see this caudal
5 migration on the films?

10:24AM

6 A. I cannot see the caudal migration. I have answered that
7 like four times.

8 Q. You agree that Ms. Jones needed to have a filter at the
9 time she did, correct?

10 A. Yes, I do.

10:24AM

11 Q. In fact, she was suffering from gastric bleeding while she
12 was hospitalized?

13 A. She had problems with gastric bleeding.

14 Q. And she also had suffered a DVT?

15 A. On multiple occasions.

10:24AM

16 Q. And she had a deep vein thrombosis incident right before, a
17 couple days right before she needed to have gastric surgery,
18 correct?

19 A. Her redo gastric surgery, yes.

20 Q. So she medically needed a filter to provide further
21 protection from any additional clotting at that time?

10:24AM

22 A. I agree.

23 Q. You have not reviewed any of her medical records from
24 before August of 2010, have you?

25 A. I don't remember. I cannot remember her -- I do not recall

10:25AM

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1 that I saw her first bypass surgery, just the second one.

2 Q. And you have not reviewed any of her medical records since
3 the filter was removed in 2015, have you?

4 A. Correct.

5 Q. Now, you would agree with me that the radiologist who saw
6 the fractured filter in 2015, she retrieved the filter through
7 a percutaneous procedure as you told us, correct?

10:25AM

8 A. Yes.

9 Q. And that procedure only took approximately 34 minutes,
10 correct?

10:25AM

11 A. Yeah. I believe that's the time.

12 Q. And she also concluded that the fragment in the pulmonary
13 artery was, and I quote, "stable; no action required."
14 Correct?

15 A. That's what she wrote.

10:26AM

16 Q. But my understanding is you disagree with the treatment
17 decision she made to leave that filter in place?

18 A. No, I don't.

19 Q. You believe that fragment should be removed, though?

20 A. I do think the fragment should be removed. I don't think
21 that she had the skill set to remove it. And that's not a
22 criticism of her. There's very few people who specialize in
23 the advanced removal techniques.

10:26AM

24 Q. Have you told Ms. Jones that you disagree with the decision
25 by her doctor?

10:26AM

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1 A. I have not told Ms. Jones that, no.

2 Q. And Ms. Jones --

3 A. It's not really disagreeing with them, but I think that
4 filter fragment should be removed.

5 Q. Have you told Ms. Jones that you believe that fragment
6 should be removed?

10:27AM

7 A. Like I just said, I have not told Mrs. Jones that.

8 Q. And in fact, you live in northwest Florida, St. Augustine,
9 correct?

10 A. Yes, I do.

10:27AM

11 Q. And you know that Ms. Jones lives in southeast Georgia, not
12 that far away, correct?

13 A. I don't know exactly where she lives but I understand she's
14 in Georgia.

15 Q. Are you aware that Ms. Jones has been diagnosed over the
16 years with severe anemia?

10:27AM

17 A. I understand she has had anemia.

18 Q. That's a condition where the body has lower red blood cells
19 than it should, correct?

20 A. That's correct.

10:27AM

21 Q. And one of the principle symptoms of anemia is fatigue, is
22 that correct?

23 A. It can be.

24 Q. You testified earlier that there's no evidence that this
25 filter provided a benefit for her?

10:28AM

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1 A. I don't believe it did.

2 Q. There would be no way of knowing whether she had any
3 clotting event that was broken up by the filter while it was in
4 place during her surgery, is there?

5 A. I disagree. 10:28AM

6 Q. You think that -- what would be the outward manifestation
7 that the filter was actually confronting a clot?

8 A. Well, I think Mrs. Jones has had two bouts of deep vein
9 thrombosis with swollen legs that brought her to the hospital.

10 So she's very aware of the signs, and she has responded by 10:28AM

11 coming to the hospital when she's had deep vein thrombosis

12 before. And I think if somebody is going to have a pulmonary
13 embolism, many of them are preceded by a deep vein thrombosis,

14 which she's very well aware of the symptoms because she's been

15 admitted twice to the hospital before with them. And there's 10:28AM

16 no evidence that that occurred. I would agree with your expert

17 witness, Dr. Hurst, the hematologist who said there's no

18 evidence she had a DVT since 2010.

19 Q. But you cannot eliminate the possibility that that she

20 could have had a pulmonary embolism that would not have been 10:29AM

21 detected because the filter did its job, can you?

22 A. There's no evidence that she's had a deep vein thrombosis
23 or a pulmonary embolism.

24 Q. If she had suffered a pulmonary embolism during her stomach

25 surgery it could have been fatal, correct? 10:29AM

—5-18-18-MD 15-2641-Jones v Bard-Jury Trial-Day 4-A.M.-Muehrcke-Cross—

1 A. Yeah, sure it can be fatal.

2 Q. And over time, in your practice, I think as you have told
3 us before, you have actually had filters catch clots and
4 prevent pulmonary embolism. Bard filters do so, correct?

5 A. Bard filters can, yes.

10:29AM

6 THE COURT: We've reached 10:30 at this time. We're
7 going to break, Ladies and Gentlemen, until 10:45. We'll
8 excuse the jury.

9 (Recess from 10:29 a.m. until 10:46 a.m.)

10 THE COURT: Mr. North, anything further?

10:46AM

11 MR. NORTH: Yes.

12 THE COURT: All right.

13 BY MR. NORTH:

14 Q. Dr. Muehrcke, as we talked about before the break, Ms.
15 Jones had her filter implanted in August of 2010, correct?

10:46AM

16 A. Correct.

17 Q. And then you have reviewed a chest X-ray taken of Ms. Jones
18 two years later in 2012, correct?

19 A. Correct.

20 Q. And there is no evidence visible on that chest X-ray of any
21 strut in her pulmonary artery, correct?

10:47AM

22 A. In 2012?

23 Q. Yes.

24 A. Correct.

25 Q. And you also looked at a chest X-ray from 2013, correct?

10:47AM

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1 A. Yes.

2 Q. And in that chest X-ray, once again, there is no evidence
3 of a strut in the pulmonary artery or any fracture of the
4 filter, correct?

5 A. Correct.

10:47AM

6 Q. Now, you reviewed some medical records from the retrieval
7 of the filter in 2015?

8 A. Yes.

9 Q. You did not review the cavagram, the inferior vena cavagram
10 that was taken as part of that retrieval procedure, did you?

10:47AM

11 A. I don't recall seeing it. I don't remember if I saw it or
12 not.

13 Q. And you did not review any other films taken after the
14 removal of that filter strut, did you?

15 A. I have seen her retrieval of her IVC filter. I have seen
16 that.

10:47AM

17 Q. Okay.

18 A. I have seen them use -- they use the cone device to
19 retrieve it from a jugular approach.

20 Q. You told us you had seen no medical records of her
21 treatment after 2015?

10:48AM

22 A. Correct.

23 Q. And therefore, you did not see the chest X-ray that was
24 performed on her in 2016, did you?

25 A. I don't think I have seen that film. I don't think I have

10:48AM

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1 seen it.

2 Q. So you don't know what the film from March of 2016 showed
3 with regard to the positioning of the retained strut in her
4 pulmonary artery, correct?

5 A. My understanding is her fragment is stable.

10:48AM

6 Q. Now, you have told us about a number of risks that you
7 believe may be posed because of that strut --

8 A. Yes.

9 Q. -- in Ms. -- if I may finish -- in Ms. Jones' pulmonary
10 artery, correct?

10:48AM

11 A. Correct.

12 Q. But as you have already told us in the past, you cannot
13 cite a single case where any of those risks have actually come
14 to pass, have you?

15 A. Oh, I'm aware of a case where those -- where a person's
16 died of a pulmonary fragment.

10:49AM

17 Q. One case, correct?

18 A. One case. There's literature where it's hard to tease that
19 out of where Des Jardine's article talks about 20 deaths from
20 the Bard filters in the MAUDE data, but you don't know if they
21 are all cardiac or pulmonary fragments. It's hard to tease
22 that out. It's not broken down. So I'm not sure that -- that
23 may be true in that situation, also.

10:49AM

24 Q. Did not cite a single medical article in your report in
25 this case regarding any risks associated with retained struts

10:49AM

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1 in the pulmonary artery, did you?

2 A. That's correct.

3 MR. NORTH: Thank you, sir. That's all I have.

4 THE COURT: Redirect?

5 REDIRECT EXAMINATION

10:49AM

6 BY MR. COMBS:

7 Q. Did Muehrcke, Mr. North asked you questions about the
8 number of documents reviewed and pointed out there were
9 millions of Bard documents you haven't reviewed, right?

10 A. Yes.

10:50AM

11 Q. Have you been deposed in this litigation?

12 A. Several. Yes, I have been deposed lots.

13 Q. And the Bard lawyers that deposed you had an opportunity to
14 present you documents in those depositions?

15 A. That's correct.

10:50AM

16 Q. In any of those opportunities to show you documents, did
17 they ever show you any documents that put their -- your
18 opinions in a different context or made you rethink anything
19 based on new documents you hadn't seen that they showed you?

20 A. No, they did not.

10:50AM

21 Q. Did they ever take a document, show you a document that put
22 Exhibit 2248 in a different light that changed your opinions?

23 A. No.

24 Q. And they had an opportunity to do so, correct?

25 A. Yes.

10:50AM

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1 Q. You were asked about the number of fractures in that
2 Exhibit 2248 in that report that described unacceptable risk?

3 A. The caudal migration?

4 Q. Correct. In general, in your experience as a medical
5 professional, you review lots of studies and you have conducted
6 studies and research, correct?

10:51AM

7 A. Correct.

8 Q. If a sample size is too small for a study to reach certain
9 conclusions about it, what's the remedy for that?

10 A. Do a larger study.

10:51AM

11 Q. Did Bard ever show you in any of your depositions any
12 documentation of a larger clinical study that would make those
13 results and that analysis irrelevant?

14 A. No.

15 Q. You were asked about your review of the records and imaging
16 at the time and what you read. And I think you got a little
17 bit confused about what imaging you reviewed for the 2010
18 implant.

10:51AM

19 A. Yeah. I apologize. It's been a while.

20 Q. But have you seen anything? Has Bard shown you anything?
21 Have you ever seen anything that showed that this was put in in
22 a tilted angle?

10:52AM

23 A. No.

24 Q. Any of Bard's experts opine it was put in in a tilted
25 angle?

10:52AM

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1 A. I haven't seen that.

2 Q. You briefly mentioned that Mrs. Jones had a couple
3 procedures preexisting the implant. What kind of medical
4 problems, just generally, what kind of medical problems was she
5 having where she had those kind of procedures?

10:52AM

6 A. She had peptic ulcer disease and she had procedures to -- a
7 gastric bypass procedure and also she had an afferent loop
8 syndrome which is a complication of the first surgery that had
9 to be fixed.

10 Q. So these are gastrointestinal issues?

10:53AM

11 A. Correct.

12 Q. Nothing to do with her heart or circulatory system, things
13 you would be involved in?

14 A. Correct.

15 Q. You were asked some questions by Mr. North, and I guess he
16 was trying to imply that you should have driven up from
17 Jacksonville to Savannah to treat Doris or she should have come
18 down there to treat with you. You are not Mrs. Jones' treating
19 physician, right?

10:53AM

20 A. No.

10:53AM

21 Q. And would it be appropriate for an expert witness in a case
22 to take on the plaintiff as a patient? Is that something you
23 would have ever done?

24 A. That would be a conflict, I would think.

25 Q. And would you be the person to take out Mrs. Jones'

10:53AM

5-18-18-MD 15-2641-Jones v Bard-Jury Trial-Day 4-A.M.-Muehrcke-Redirect

1 fragment within her pulmonary artery? Have you ever done a
2 procedure like that? Would you do you a procedure like that?

3 A. I would not be the person to do that. She would have to go
4 to a center that specializes in that, and there's very few
5 places in the United States that do that. There's Stanford.

10:54AM

6 There's Northwestern. There's University of Pennsylvania
7 Hospitals where people see enough of these problems where they
8 have become experts in using advanced different techniques to
9 remove them. But I certainly wouldn't do that myself. They
10 have quite a bit of experience at University of Pennsylvania.
11 They have a 71-percent retrieval rate of pulmonary fragments.

10:54AM

12 Q. You were asked about, and forced to admit because it's
13 true, that all filters have complications. Do you recall that?

14 A. Yes, I do.

15 Q. What's different about the complications with the Bard
16 filters that makes them, in your opinion and in your clinical
17 experience, different than the other complications in other IVC
18 filters?

10:54AM

19 A. In my experience and my colleagues' experience, the Bard
20 filters have not only more complications but they have a
21 constellation of all the different types of problems together
22 and typically and more than other filters. And it may be due
23 to a design problem, you know. That's been my experience with
24 it.

10:55AM

25 Q. And then Mr. North asked about the explanting physician,

10:55AM

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1 Dr. Nelson, and a note in her medical records and her notes for
2 the explant procedure that she thought the fragment was stable.
3 And why don't you tell us your perspective as cardiothoracic
4 surgeon about whether that fragment is stable.

5 A. Well, the pulmonary artery is a hostile environment. The 10:55AM
6 right ventricle pumps blood through the pulmonary artery and
7 that's not a situation that that fragment is supposed to be in,
8 especially being the inferior vena cava, which is a low flow
9 area. The pulmonary artery is a higher pressure, higher
10 dynamic area and also the lungs are going up and down. We 10:56AM
11 breathe 16 to 20 times per minute, and that spear is in her
12 pulmonary artery, which can be damaged by the lung going up and
13 down. And I would be concerned about that.

14 I personally would see if it could be removed
15 percutaneously. 10:56AM

16 Q. Without listing all the articles that you have reviewed,
17 both for this case and just for your practice, but just
18 generally, is there medical literature that supports that
19 opinion?

20 A. Taking out fragments of the pulmonary artery, yes, there 10:56AM
21 are.

22 Q. Has there been medical literature on that even since Dr.
23 Nelson performed the explant procedure in 2015?

24 A. Yes.

25 Q. Even since you did your expert report in this case? 10:56AM

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1 A. I would have to look at it. I can't recall.

2 Q. You have opined in this case and talked at length about
3 that the filter tilted, correct?

4 A. Correct.

5 Q. Migrated?

10:57AM

6 A. Yes.

7 Q. Maybe to a small degree, but whether it's tilt or
8 migration, are these kind of the same thing?

9 A. Yeah, it is. But I think the big problem here is not the
10 tilt or the migration. She's got a fragment in her pulmonary
11 artery. That's the problem.

10:57AM

12 Q. And that's the cascade, right?

13 A. Yes. That's the issue here.

14 Q. And in this case, Mr. North explained about how it's -- he
15 called it a 10:02 or however he wanted to phrase it, it's a
16 very small, very tiny tilt in this case, right?

10:57AM

17 A. Correct.

18 Q. And the Bard filter, Eclipse Filter in Mrs. Jones still
19 fractured, went through her heart, into her pulmonary artery?

20 A. Correct.

10:58AM

21 MR. COMBS: No further questions, Your Honor.

22 THE COURT: Thank you, sir. You can step down.

23 MR. COMBS: Your Honor, can I ask him one more
24 question? Sorry. I had to consult with my lawyers, team of
25 them.

10:58AM

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1 BY MR. COMBS:

2 Q. Dr. Muehrcke, are all the opinions you gave today to a
3 reasonable degree of medical certainty?

4 A. Yes.

5 Q. Thank you very much.

10:58AM

6 MR. CLARK: Your Honor, at this time the plaintiff
7 would call Bret Baird.

8 THE COURTROOM DEPUTY: Mr. Baird, would you please
9 come forward. Stand right here and raise your right hand,
10 please.

10:59AM

11 (The witness was sworn.)

12 THE COURTROOM DEPUTY: Could you please state your
13 name and spell it for the record?

14 THE WITNESS: Bret Baird. B-R-E-T, B-A-I-R-D.

15 MR. CLARK: Your Honor, at this time the plaintiff
16 would move into evidence the following exhibits: 571, 589,
17 590, 591, 592.

11:00AM

18 THE COURT: Little more slowly. 591.

19 MR. CLARK: 592, 1053, 1568, 1740, 1788, 4414, 4416,
20 4454, 4455, 4456, 4457, 4467, 4468, 4469 and 4499.

11:00AM

21 THE COURT: What was the last one?

22 MR. CLARK: 4499.

23 MS. HELM: No objection, Your Honor.

24 THE COURT: Those are all admitted.

25

5-18-18-MD 15-2641-Jones v Bard-Jury Trial-Day 4-A.M.-Baird-Direct

1 BRET BAIRD,
2 called as a witness herein, having been duly sworn, was
3 examined and testified as follows:

4 DIRECT EXAMINATION

5 BY MR. CLARK:

6 Q. Pardon the housekeeping.

7 Could you please tell us, sir, when did you -- have
8 you worked for Bard Peripheral Vascular System?

9 A. Yes.

10 Q. When did you start working there?

11:01AM

11 A. In 2006. End of 2006, beginning of 2007.

12 Q. Do you have a month, or is that just a general
13 recollection?

14 A. I believe it was December 2006.

15 Q. And my understanding is that during that time you started
16 off as a senior project manager?

11:01AM

17 A. Senior product manager, correct.

18 Q. Was that a marketing function?

19 A. Yes.

20 Q. And you had that function until April of 2008?

11:01AM

21 A. Correct.

22 Q. And then you became the marketing manager, correct?

23 A. The franchise manager, correct.

24 Q. And I have seen that you have described your role as
25 franchise manager as having global responsibilities for a \$50

11:01AM

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1 million division coordinating full upstream and downstream
2 marketing and development activities. Is that how you
3 described that role?

4 A. Correct.

5 Q. And in your capacity as a franchise manager, did you direct
6 the core creative ideas for marketing for Bard?

11:02AM

7 A. Did I create -- as a marketing person I created the
8 marketing pieces, correct.

9 Q. That would include online marketing campaigns?

10 A. Correct, yes.

11:02AM

11 Q. Educating the sales force?

12 A. I was one of the many who did that, correct.

13 Q. And were you also one of the people who would educate
14 customers?

15 A. One of the many who would do that.

11:02AM

16 Q. And my understanding is that you were let go by Bard in
17 October 2011, is that right?

18 A. Yes.

19 Q. And you weren't given a specific reason for that
20 termination?

11:02AM

21 A. Nope.

22 Q. And you have given a deposition in this case, right?

23 A. Correct. Yes.

24 Q. Pretty long deposition?

25 A. Yeah.

11:02AM

5-18-18-MD 15-2641-Jones v Bard-Jury Trial-Day 4-A.M.-Baird-Direct

1 Q. And did Bard hire attorneys for you in that deposition?

2 A. Yes.

3 Q. And did Bard agree to compensate you for your time in
4 preparing and attending that deposition?

5 A. Yes.

11:03AM

6 Q. And that was \$150 an hour?

7 A. I believe so.

8 Q. And are you being compensated for your time and for
9 preparing and coming here to talk to the jury today?

10 A. Yes. I hope so.

11:03AM

11 Q. Is it at that same rate?

12 A. We haven't even finalized that. I don't know.

13 Q. Depends how good you do?

14 A. What's that?

15 Q. Depends how good you do?

11:03AM

16 A. No. Actually, every price every year changes. I actually
17 do business consulting which my rates have gone up, things like
18 that. So it depends.

19 Q. Now, what do you do for a living now?

20 A. So I am a director for an orthopedic financial services
21 group which does orthopedic surgery on a lien at financial
22 services.

11:03AM

23 Q. And on a lien, what does that mean?

24 A. Just means for patients who need -- they don't have health
25 care and they need to be able to do the surgery. We finance it

11:04AM

5-18-18-MD 15-2641-Jones v Bard-Jury Trial-Day 4-A.M.-Baird-Direct

1 for them.

2 Q. What is the lien attached to?

3 A. A settlement for them. It's a case for them which is if
4 they were injured in a car accident.

5 Q. Okay. So you would be working with lawyers to get
6 compensation from any recovery that the injury victim might
7 get?

11:04AM

8 A. Yes.

9 Q. Let's talk about marketing at Bard. I take it Bard
10 believes in marketing as part of its overall business strategy.
11 Is that fair?

11:04AM

12 A. That's true.

13 Q. And they hired you?

14 A. Yep.

15 Q. And you are an MBA, correct?

11:04AM

16 A. Correct.

17 Q. You got your MBA from Harvard?

18 A. Yes.

19 Q. That's a pretty good school, right?

20 A. I hope so.

11:04AM

21 MR. CLARK: Gay, would you please bring up Exhibit
22 1053?

23 Your Honor, may I publish this to the jury?

24 THE COURT: Yes.

25 MR. CLARK: Gay, please go to Page 2 of 10. Next

11:04AM

5-18-18-MD 15-2641-Jones v Bard-Jury Trial-Day 4-A.M.-Baird-Direct

1 page, please. There we go.

2 BY MR. CLARK:

3 Q. If you look at the middle of this paragraph that begins
4 market customer service device, and understanding, this is a
5 document that preceded your time at Bard. It was an earlier
6 document relating to a different filter.

11:05AM

7 Do you see where it says: Users can be swayed by ease
8 of use, low profile, and aggressive marketing even in the
9 absence of solid clinical history and in spite of documented
10 negative clinical experiences.

11:05AM

11 Did I read that correctly?

12 A. Okay.

13 Q. While you were at Bard, in your experience, did they have
14 an aggressive marketing campaign?

15 A. Did they have aggressive marketing campaign? I don't know
16 how to answer that. We're constantly trying to market and --

11:06AM

17 Q. Is one of the things you might try to do through marketing
18 overcome customer reluctance or concerns about products?

19 A. The primary role in marketing, especially with what I'm
20 doing is for product launches, introduce new products, to talk
21 about our current product line.

11:06AM

22 Q. So one of the functions you had would be to introduce new
23 products and get the word out about new products, right?

24 A. Yeah.

25 Q. Some of what you did was also dealing with customer

11:06AM

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1 complaints about existing products, right?

2 A. No. Complaints go through field assurance.

3 Q. What I mean by "complaints" is concerns that customers were
4 expressing?

5 A. I'm sorry. Can you ask that question differently? 11:06AM

6 Q. Sure. You told me one of the things that you did would be
7 to support new projects that were coming on line at Bard,
8 right? That would be on the offensive side?

9 A. Right.

10 Q. Did you do some defense also? 11:07AM

11 A. In regards to helping our sales force answer questions like
12 Q&A and things like this, yes.

13 Q. So you would also support existing lines of business and
14 products?

15 A. Correct. 11:07AM

16 Q. And if there were concerns or problems that came in,
17 marketing would be one of the groups that would address those
18 customer concerns, right?

19 A. With a whole team of people depending on what those
20 concerns were, correct. 11:07AM

21 Q. Was one of the functions of marketing to improve the
22 reputation or branding of devices?

23 A. Absolutely. That's probably the quintessential marketing
24 role.

25 Q. And as I understand it, you, in the marketing department, 11:07AM

~~5-18-18-MD 15-2641-Jones v Bard-Jury Trial-Day 4-A.M.-Baird-Direct~~

1 would interact with the sales force. Right?

2 A. Correct.

3 Q. So you would create messaging and communication planning,
4 and that would be disseminated to the boots-on-the-ground sales
5 force?

11:07AM

6 A. Yes.

7 Q. As a franchise manager, would you consider that a dynamic
8 position?

9 A. Absolutely.

10 Q. You had to interface with a whole bunch of different groups
11 at Bard. Correct?

11:08AM

12 A. Correct. Yeah.

13 Q. That would include upper management?

14 A. Yeah.

15 Q. Other people in the marketing department?

11:08AM

16 A. Yes.

17 Q. Engineering sometimes?

18 A. Uh-huh. Yes.

19 Q. And, of course, sales?

20 A. Yes.

11:08AM

21 Q. And the project you worked on would cut across multiple
22 disciplines as well at Bard. Right?

23 A. Absolutely. Yeah. These types of projects are really team
24 focused.

25 Q. Now, Bard's ultimate customer with respect to its medical

11:08AM

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1 device products are the physicians that use those products.

2 Correct?

3 A. Correct. There's multiple layers of customers, but yes.

4 Q. And you, in your capacity as franchise manager, would, on
5 occasion, meet with doctors to talk about products. Right?

11:08AM

6 A. On occasion. Not that often.

7 Q. And you might meet them at a conference or perhaps
8 entertain them. Is that right?

9 A. Yes.

10 Q. And Bard also had a sales force that would handle the
11 majority of those types of functions. Right?

11:09AM

12 A. Correct.

13 Q. Now, while you were at Bard, is it fair to say you worked
14 extensively with their IVC filter line of products?

15 A. When I was a filter franchise manager.

11:09AM

16 Q. And that started in 2008?

17 A. 2008. April.

18 Q. So the products that were on line at the time you started
19 were the G2, is that right?

20 A. I think we launched -- we were launching G2X or Express at
21 the time.

11:09AM

22 Q. So you came in right around the time when the G2 was
23 transitioning to the G2X?

24 A. I believe so.

25 Q. And the G2X essentially had a hook on the top of the G2?

11:09AM

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1 A. Yes. I'm sorry. This is now history. I am two jobs past
2 this. So any reference to these things I have to think about
3 to remember.

4 Q. No problem. But you do remember that the G2X came on line
5 early in your tenure as the franchise manager. Right?

11:09AM

6 A. Yes.

7 Q. And that eventually gave way to the Eclipse Filter?

8 A. Yep.

9 Q. And were you there when the Meridian came on line?

10 A. Yes.

11:10AM

11 Q. Were you there when the Denali came on line?

12 A. No.

13 Q. Now, one of the primary things you did was to support those
14 products as they came on line, right?

15 A. Correct.

11:10AM

16 Q. As a marketing person you wanted to help the sales force
17 get the product out there and get it to customers?

18 A. Yes.

19 Q. And one of the ways that you could do that would be to
20 identify new opportunities for products. Right?

11:10AM

21 A. Absolutely.

22 Q. And while you were at Bard you participated in multiple
23 filter franchise reviews. Right?

24 A. Yeah. That was a -- yes.

25 MR. CLARK: Could you bring up, please, Gay, 571.

11:10AM

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1 Your Honor, may I publish 571 to the jury?

2 THE COURT: You may.

3 BY MR. CLARK:

4 Q. Is this an example of a filter franchise review?

5 A. Yes.

11:11AM

6 Q. And this is -- your name is first on the list down there,
7 right?

8 A. Correct.

9 Q. You made a contribution to the creation of this document?

10 A. This is the 2008 one, so I think I was there for a month.

11:11AM

11 So I was one of the team members.

12 Q. Generally, as I understand, these come out about every six
13 months where Bard sort of takes inventory of what's going on
14 with its products?

15 A. These happen every six months, the purpose of which is
16 primarily three-year budgeting. So you are always looking
17 to -- well, if you don't mind I will take a minute to explain
18 it.

11:11AM

19 So a filter or a franchise review just happens in all
20 the different organizations. It happens all at once meaning
21 stents and balloons, things like that. So you are put together
22 as a team to prepare documents to the board or the president of
23 the company who might fly in. And it helps understand where
24 the opportunities are for the future, where the money is going
25 to be spent for the future.

11:11AM

11:12AM

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1 Q. And this document is a collaboration between marketing,
2 sales, and engineering. Is that fair?

3 A. Yes. And there might even be more people. I don't
4 remember.

5 Q. And like you said, it gets into -- it gets presented to the 11:12AM
6 president on occasion and the Board of Directors?

7 A. Say that again.

8 Q. Does it get presented to Bard leadership including the
9 president?

10 A. Depending on who is coming in or who is presenting, yes. 11:12AM

11 So it might be just the Bard Peripheral Vascular board or might
12 be the president that comes in.

13 MR. CLARK: Page 2, Gay.

14 BY MR. CLARK:

15 Q. This slide is a depiction of the market share by company, 11:12AM
16 is that's right?

17 A. Yes.

18 Q. And it looks like Bard had about 28 percent of the overall
19 market share for the filter market. Right?

20 A. Yes. 11:12AM

21 Q. And one of your goals as a filter franchise manager was to
22 move Bard to a position where it was the leader in market share
23 for filters, right?

24 A. Correct. Oh, yeah.

25 Q. Turn to Page 7, please. Here we have an SWOT. Can you 11:13AM

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1 tell the jury what that stands for?

2 A. Sure. SWOT, strength, weakness, opportunity, threat. So
3 SWOT is a very standard business marketing tool, kind of a --
4 well, best way to say it is a tool that you use as a marketing
5 person to assess opportunities and what's happening with your
6 product, what opportunities, what -- well, what are the
7 strengths, weaknesses, opportunity, threats.

11:13AM

8 Q. That's with respect to the products?

9 A. And the market, correct.

10 Q. Now, if you look under weaknesses, one of the identified
11 weaknesses is that the -- I guess the product or the people
12 making the product were a device focused versus disease-state
13 focused. Do you see that?

11:13AM

14 A. Sure.

15 Q. And do I take that to mean there was a concern expressed
16 that the company was more concerned about the product itself as
17 opposed to the condition it was intended to treat?

11:14AM

18 A. I don't recall. I don't remember what the purpose of that
19 was.

20 Q. Did you write that?

11:14AM

21 A. I have no idea.

22 Q. Another function or expression of weaknesses was reactive
23 slash evolutionary designs. What did that mean?

24 A. Reactive evolutionary designs. I don't recall.

25 Q. Do you see there at the last bullet point there was a

11:14AM

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1 market perception of BPV filter higher complication rates.

2 That's pretty self-explanatory, right?

3 A. Whatever it says there.

4 Q. Now, I understand from your deposition that market
5 perception is the perception of the customers who are the
6 doctors. Is that right?

11:14AM

7 A. I'm sorry, from what?

8 Q. From the doctors. That's the market you are talking about
9 there?

10 A. I would assume so. Again, I don't -- this is a document
11 way back when.

11:15AM

12 Q. If you told us in your deposition that the market
13 perception was based on what doctors were telling Bard, would
14 you have any reason to disagree with that?

15 A. Yes. Depending on the time we're talking about, there was
16 all sorts of things going on in the market. We had customers
17 who were -- sorry -- competitors who were attacking us with
18 MAUDE data that they cooked up. We also eventually had calling
19 attorneys that were attacking Bard filters on the market, our
20 products alone.

11:15AM

11:15AM

21 Q. You are referring to a filter law website. Is that right?

22 A. Yeah, as well as other attorneys that were getting on
23 board.

24 MR. CLARK: Your Honor, may we approach?

25 THE COURT: Yes.

11:15AM

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1 If you want to stand up, Ladies and Gentlemen.

2 (Discussion was had at sidebar out of the hearing of
3 the jury:)

4 MR. CLARK: Your Honor, as we mentioned this morning,
5 and as I was assured by counsel we were going to be dealing 11:16AM
6 with the filter law website specifically, I have asked my
7 questions based on that. This is sort of a gratuitous
8 injection into other things. I don't think that's fair because
9 we made a deliberate decision about this line of questioning
10 specific to that website. So for him to inject that 11:16AM
11 gratuitously particularly when we had an e-mail exchange, we
12 agree we're all talking about the website.

13 MS. HELM: Your Honor, I told him to limit it to
14 filterlaw.com. I don't know where that statement came from.
15 If asked, is it your understanding that these attorneys were 11:16AM
16 not involved, he's going to say yes, that's my understanding.

17 THE COURT: What do you propose to do?

18 MR. CLARK: I think at this juncture what I should be
19 permitted to do is ask him, the attorneys you were referring to
20 had a website called filterlaw and they were in Illinois. And 11:17AM
21 then a follow-up question that they were not the attorneys in
22 this courtroom.

23 MS. HELM: I'm fine with that.

24 THE COURT: I think that's reasonable.

25 MR. CLARK: As long as he doesn't inject more. 11:17AM

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1 MS. HELM: I think the problem is that -- and I did
2 instruct him more than once to limit it to filterlaw.com. I
3 think what happened is, as happens, other lawyers picked up on
4 filterlaw, and that's what he's referring to. So I can't
5 instruct him but I have already told him to limit it to
6 filterlaw.com. He doesn't know who it was. He doesn't know
7 who the lawyers were. He just knows they were dealing with
8 filterlaw.com. And he knows if you ask him is it your
9 understanding that did not involve any of the lawyers in this
10 case, he's going to say yes, that's my understanding.

11:17AM

11:17AM

11 THE COURT: Okay. Are you good with that?

12 MR. CLARK: I feel like it's -- I don't know how to
13 put the toothpaste back in the tube at this point. That's the
14 problem. I think what might be a more direct thing would be
15 for the Court to instruct the jury that the filterlaw website
16 involved attorneys from -- that his answer involved the
17 filterlaw website which is attorneys from Illinois who are not
18 part of this case. That way I don't have to ask him more
19 questions.

11:18AM

20 MS. HELM: That's fine.

11:18AM

21 THE COURT: So what I will tell the jury is I will say
22 something like, you just heard the witness refer to the
23 filterlaw website and other attorneys who might have referred
24 to the website. The parties have agreed that all of the
25 lawyers who were involved with the filterlaw website have

11:18AM

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1 nothing to do with this case and the plaintiff's attorneys in
2 this case have no involvement with it.

3 MR. O'CONNOR: Are we going to hear the baggage issue?

4 MR. CLARK: Hopefully he will get the message.

5 THE COURT: Are you going to get to the baggage issue
6 before lunch?

11:19AM

7 MR. CLARK: I expect I will.

8 THE COURT: Did you talk to him specifically about
9 that?

10 MS. HELM: Yes, Your Honor.

11:19AM

11 THE COURT: If I need to give another instruction at
12 that time, I will. Okay.

13 (In open court.)

14 THE COURT: Ladies and Gentlemen, before we continue
15 with Mr. Baird's testimony, let me share with you a stipulation
16 from the parties. Mr. Baird made reference a moment ago to
17 something called a filterlaw website and attorneys who were
18 involved with it. The parties have stipulated that these
19 plaintiff's attorneys in the case have nothing to do with that
20 website or the lawyers who were involved.

11:19AM

11:19AM

21 All right. Mr. Baird, you may continue.

22 MR. CLARK: One moment, sir.

23 Gay, could you pull up Page 74 of his deposition.

24 BY MR. CLARK:

25 Q. Sir, can I direct your attention to Page 74 of your

11:20AM

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1 deposition which is displayed there. You were asked the
2 question: Market perception of BPV filter has higher
3 complication rates. That's what it says. I'm sorry. That was
4 your answer to a question.

5 And the following question is: Where the perception 11:20AM
6 comes from is the doctors, meaning the guys that are putting
7 these things in using your products, correct?

8 A. Correct.

9 Q. And your answer was: Correct. That's market perception.
10 The market is the doctors. 11:20AM

11 Does that refresh your recollection?

12 A. Sure.

13 Q. Now, in terms of doctors, the sales force at Bard are the
14 ones who primarily interface with the doctors, right?

15 A. I'm sorry. Say that again. 11:21AM

16 Q. Bard sales are the people who generally interface with the
17 doctors?

18 A. Correct.

19 Q. They are sort of the face of Bard in the outside world?

20 A. Yes. 11:21AM

21 Q. And the sales people would cultivate relationships with
22 those doctors. Is that fair?

23 A. Sure.

24 Q. And doctors would rely on the sales force to bring them
25 information about new products. Right? 11:21AM

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1 A. I can't speak for the doctors, but there's data available
2 on all sorts of avenues for the doctors to get it.

3 Q. One of the things that you did was to make sure sales force
4 had data to provide to doctors. Right?

5 A. True. 11:21AM

6 Q. Or certain types of data, anyway.

7 A. Yes.

8 Q. You would agree the data that the sales force had to
9 provide to the doctors should be accurate. Right?

10 A. True. Correct. 11:21AM

11 Q. So in terms of the flow, the salespeople would look to Bard
12 to get the information and they would, in turn, disseminate
13 that to the doctors?

14 A. Say that again. The Bard people what?

15 Q. So information goes from Bard? 11:22AM

16 A. Right.

17 Q. To sales to the doctors. Right?

18 A. That's one vehicle. There's lots of other vehicles.

19 Q. There might be some direct communications between Bard and
20 doctors, is that right? 11:22AM

21 A. Correct.

22 Q. Now, going back to the exhibit, please. Now this is a
23 confidential internal document, right, if you look at the
24 bottom?

25 A. Looks like it. It's confidential. 11:22AM

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1 Q. This isn't something that gets put on the website that the
2 public can see?

3 A. No. Do you know what this is? I only have one page so I
4 don't know what this document is.

5 Q. I'm sorry. This is back to the Exhibit 571.

11:22AM

6 A. Oh. Filter franchise. Okay. Thank you.

7 MR. CLARK: Gay, can you go to Page 8 of this exhibit,
8 please.

9 BY MR. CLARK:

10 Q. Now, we talked about strengths and weaknesses. One of the
11 things it also has identified are threats. Is that right?

11:23AM

12 A. Correct. That's the model SWOT.

13 Q. And one of the threats that's identified is a trend to
14 focus on complications related to optional IVC filters in
15 clinical literature. Did I read that correctly?

11:23AM

16 A. Yep.

17 Q. And clinical literature is literature created by customers,
18 the doctors?

19 A. By the doctors, correct.

20 Q. So you are saying the doctors have a tendency to focus on
21 complications related to optional IVC filters. Is that right?

11:23AM

22 A. I'm not saying that, but the team must have put that in a
23 document.

24 Q. Those may not be your words, but that's something that Bard
25 created?

11:23AM

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1 A. Yeah.

2 Q. Let me ask you, so part of the purpose of identifying
3 strengths and weaknesses is to evaluate whether there are other
4 opportunities for Bard to get out there with either different
5 products or new lines of business. Right?

11:24AM

6 A. Absolutely.

7 Q. This is a tool to develop that?

8 A. Yeah. This document, franchise review, again, that's a lot
9 of what the purpose is.

10 Q. So this analysis will be part of the decision making in
11 terms of trying to figure out what types of projects would be
12 useful for the company to go for?

11:24AM

13 A. Yes.

14 MR. CLARK: Gay, could you please turn to Page 14.

15 BY MR. CLARK:

11:24AM

16 Q. If you look at Item Number 2, one of the product line
17 strategies, and the product line we're referring to is the IVC
18 filter line, right?

19 A. Yes.

20 Q. And one of the strategies under Number 2 was to implement
21 short-term modifications to enhance the current platform. And
22 it has in parenthesis G3?

11:24AM

23 A. Yes.

24 Q. Am I to take from that that the current platform was a G2
25 Express like you told us, and there were plans to make a

11:25AM

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1 further iteration of that that would make modifications to
2 enhance it?

3 A. Correct.

4 Q. And then Item Number 3 was to introduce a next gen
5 operational filter that significantly reduces complications.
6 Right? Is that right?

11:25AM

7 A. Yeah.

8 Q. So the plan was to come up with a G3 in the sort-term and
9 have a next generation device in the somewhat longer term?

10 A. Correct. Yeah. That was a fairly -- a next gen is a very
11 large project, takes years and a lot of money to do. So the
12 implement short-term modifications is a chance to be able to
13 continue and improve your current design to try to enhance it
14 and make it better.

11:25AM

15 Q. It is also a chance to keep the product on the market while
16 you are working on making the product better. Right?

11:25AM

17 A. I don't understand the question. The product is already
18 there.

19 Q. It's there. And this will preserve some market share while
20 you are working on the next generation?

11:26AM

21 A. Yeah. I don't think any medical device company would ever
22 pull a product while they are waiting for the next generation
23 product.

24 Q. We'll talk about that in a little bit. But for the touchup
25 or the short-term modifications for the G3, that project

11:26AM

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1 ultimately became the Eclipse Filter. Right?

2 A. I don't know. I remember the name G3. I know it
3 eventually -- I know Eclipse was the next filter.

4 Q. So the next generation filter after G2X was the Eclipse?

5 A. Correct.

11:26AM

6 Q. And the next generation filter was the one that came on
7 line after the Eclipse, the Meridian. Right?

8 A. No.

9 Q. What was between Eclipse? What was after Eclipse?

10 A. Well, that is successfully correct, but when we talk about
11 next generation, that's Denali.

11:26AM

12 Q. One of the things we ultimately will learn in this case is
13 that the Eclipse Filter was going to have caudal anchors. Do
14 you remember that?

15 A. That's more of an R&D discussion. But I don't recall.

11:27AM

16 Q. I will see if we can find some documents that help us with
17 that.

18 Could you go to Page 19?

19 On under G3 the objective was to improve the G2
20 platform to address current complications without a clinical
21 trial.

11:27AM

22 A. Okay.

23 Q. And like you told us, a clinical trial can take a lot of
24 time, right?

25 A. Correct.

11:27AM

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1 Q. And can cost a lot of money?

2 A. Yes.

3 Q. So the idea here was to be able to have something that
4 would improve the product without having to go through the
5 expenditure of the resources and time necessary to do a
6 clinical trial?

11:27AM

7 A. I think a better way to say that is that we're able to get
8 something out as quickly as possible to improve it.

9 Q. To improve the existing platform but not address the
10 significant complications that you hoped to address with the
11 next generation filter?

11:28AM

12 A. I think we have to be careful of the semantics we're
13 talking about. Let's piece that apart. Say that again.

14 Q. So this is going to address current complications without a
15 clinical trial?

11:28AM

16 A. Correct.

17 Q. And like we saw on the slide before, the next generation
18 filter was going to significantly improve those complication
19 rates?

20 A. That was the hope.

11:28AM

21 Q. That was the plan, right?

22 A. Correct. And that's Denali.

23 MR. CLARK: Gay, could you please pull up Exhibit
24 4454.

25 May I publish this to the jury?

11:28AM

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1 THE COURT: Yes.

2 BY MR. CLARK:

3 Q. And this is an Eclipse Vena Cava Concept POA. What's POA
4 stand for?

5 A. Product opportunity assessment. 11:28AM

6 Q. And if we go to Page 3, is this a report that you prepared?

7 A. Yes.

8 Q. And Page 4, please. Now, the goal was to have
9 electropolishing with this Eclipse Filter. Right?

10 A. Correct. 11:29AM

11 Q. And that would bring it up to industry standard. Right?

12 A. Again, that's an R&D discussion.

13 Q. Okay. So when we see things like what this product is
14 going to do, you are incorporating information provided by
15 other departments at Bard? 11:29AM

16 A. Sorry. Say that again.

17 Q. Are the information things like what electropolishing is
18 going to do, that's not something you come up with as marketing
19 manager?

20 A. Right. 11:29AM

21 Q. That's something that comes from engineering or other
22 developers?

23 A. Yeah.

24 Q. So as I understand it, you come up with a concept, right?

25 A. We as a team come up with a concept, yeah. 11:29AM

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1 Q. And then it goes to engineering?

2 A. No. I think you are making it successive. And I'm not
3 quite sure what the discussion point is, but it's a team
4 document.

5 Q. Okay. So we have a team document. And at some point the
6 engineers get involved and provide input to the document.
7 Right?

11:30AM

8 A. Again, I don't think it's successive. This is a holistic
9 thing. It, as a team, works on these things all the time.

10 MR. CLARK: Gay, let's pull up Exhibit 4455.

11:30AM

11 BY MR. CLARK:

12 Q. Are you familiar with this DIS approval form?

13 A. This form, yes.

14 Q. And, in fact, you were a signatory to this form, right?

15 You had to sign off on it?

11:30AM

16 A. Yes.

17 MR. CLARK: Can we publish this exhibit to the jury,
18 Your Honor?

19 THE COURT: Yes.

20 BY MR. CLARK:

11:30AM

21 Q. Now, this was signed by various people in November 2009,
22 correct?

23 A. Yes.

24 Q. And will you recall that that was roughly a month after the
25 product opportunity assessment that we just looked at?

11:31AM

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1 A. I'm sorry. We can go back. But the dates?

2 Q. Would it surprise you if this was a document that appeared
3 after the product opportunity assessment?

4 A. I don't know. But if we can look at dates, I can tell you.

5 MR. CLARK: Gay can you pull up the date of the last
6 one please? I think I have the wrong document here. In
7 November 2009 -- go back to 4455, please.

11:31AM

8 BY MR. CLARK:

9 Q. This is a design input study. Is that right?

10 A. Correct. Not study but design input summary.

11:31AM

11 Q. And if we look on Page 3 under purpose, it says: This
12 report documents and summarizes the design input information
13 gathered during the concept phase of the Vail project.

14 Was the veil project another name for what would later
15 become the Eclipse?

11:32AM

16 A. Yes.

17 Q. And this design input information is used to develop the
18 product performance specification, product design, and test
19 plans. Is that your understanding of how this document works?

20 A. How it reads, yeah. I can just confirm what it says.

11:32AM

21 Q. You are confirming that that's -- at least that's what the
22 document says its purpose is?

23 A. Yeah.

24 Q. If we look under Section 5 at the bottom, 5.0, there's a
25 comment about surface finish. Do you see that?

11:32AM

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1 A. Yes.

2 Q. And it says that electropolishing the current G2X for the
3 current -- electropolishing the current G2X vena cava filter
4 will improve the surface finish and will make the filter
5 consistent with emerging industry standards for implantable
6 Nitinol devices.

11:32AM

7 Did I read that correctly?

8 A. Yes.

9 Q. So one of the purposes of having this finished was to bring
10 it up to what were the emerging industry standards?

11:33AM

11 A. That looks like it.

12 Q. And this paragraph here doesn't mention anything about
13 fatigue resistance or fracture resistance, correct?

14 A. Correct.

15 MR. CLARK: Would you please bring up Exhibit 592.

11:33AM

16 May I publish this to the jury, Your Honor?

17 THE COURT: Yes.

18 BY MR. CLARK:

19 Q. Mr. Baird, this looks to be an e-mail between you and Brian
20 Reinkensmeyer in April of 2010. Do you recall this document?

11:33AM

21 A. No.

22 Q. If you look at the first page, there's in about the middle
23 it says: Bret, please clarify if we can use the statement you
24 use in the field, question mark. And the statement reads:

25 Bench testing demonstrates an improved resistance to fracture

11:33AM

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1 when compared to the G2X Filter.

2 Did I read that correctly?

3 A. Yep.

4 Q. And what he's asking you -- if we can pull it back, Gay, up
5 top if you want to blow that up -- is whether he can use that
6 statement in his communications in the field, right?

11:34AM

7 A. Correct. Yeah.

8 Q. And you tell him that yes, this is now approved and will
9 show up at our next iteration of sales brochures. But then you
10 go on to say you must use all of the verbiage though. You
11 can't say now it's just fracture resistant.

11:34AM

12 Did I read that correctly?

13 A. Yes.

14 Q. And what is the difference between resistant to fracture
15 and fracture resistant?

11:34AM

16 A. I'm not quite sure I understand the question.

17 Q. Well, you are telling him to be very careful and to use the
18 verbiage that was provided in that, which is that bench testing
19 demonstrates improved resistance to fracture when compared to
20 the G2X. But you are saying, don't say fracture resistant.

11:34AM

21 I'm trying to understand what that means. What's the
22 difference?

23 A. I'm sorry, I can't recall back then that far what the
24 nuances of it was. I can say that just stepping back a little
25 bit from the document, that in a sales force you always want to

11:35AM

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1 bake and create and do whatever they want. And it is very
2 clear on the marketing side internally what things go through
3 review, goes through legal, corporate, goes through regulatory
4 clinical. So it's very clear what, as a marketing person we
5 need to communicate to the salesperson what can be said, what
6 can't be said. So whenever you hear language in an e-mail like
7 that it's almost default for a marketing person to say you have
8 got to use the language we provided you.

11:35AM

9 Q. And specifically, you are telling him you can't say this is
10 fracture resistant?

11:35AM

11 A. Again, all I can do is refer to what this is saying. I
12 don't know what the nuances of it was.

13 Q. Earlier we talked about some of the negative -- well, some
14 of the perceptions that positions were focusing on
15 complications with the IVC filters. Do you remember that when
16 you were talking about under the SWOT assessment?

11:36AM

17 A. Okay.

18 Q. Do you remember a study by Dr. Nicholson that came out in
19 August 2009?

20 A. Yes.

11:36AM

21 Q. And that was a significant study from Bard's perspective
22 because it was critical of the G2 Filter, right?

23 A. Sure.

24 Q. And one of the things -- well, let me pull up the study
25 here.

11:36AM

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1 Could you pull up 587?

2 Do you remember getting a copy of this study?

3 A. I don't.

4 Q. Does that appear to be a copy of Dr. Nicholson's study
5 concerning?

11:36AM

6 A. I can confirm that that's his name on it.

7 Q. If you look at -- do you remember what -- well, this was
8 not a favorable study to Bard, correct?

9 A. As far as I recall, no.

10 Q. It was something that Bard and its marketing department
11 were concerned about, right?

11:37AM

12 A. Correct.

13 Q. And one of the things that it talked about was a higher
14 than expected failure rate with G2 Filters, correct?

15 A. I'm sorry. I'm not the clinical person. I can't recall
16 the details of this especially so many years now.

11:37AM

17 Q. Bard had a reaction to this document. That's fair to say,
18 right?

19 A. Correct.

20 MR. CLARK: Your Honor, I would move to admit this
21 document.

11:37AM

22 MS. HELM: Your Honor, 802.

23 THE COURT: What's your response on hearsay?

24 MR. CLARK: Your Honor, we are not offering it for the
25 truth of the matter asserted. We would like to talk about what

11:37AM

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1 it says and to establish what Bard's reaction was. And I think
2 that doesn't matter whether it's true or not.

3 THE COURT: Your response, Ms. Helm?

4 MS. HELM: I'm sorry, Your Honor. I'm looking at the
5 code section. 11:37AM

6 THE COURT: So you are not seeking to use it under
7 803.18. Is that right?

8 MR. CLARK: No, Your Honor. I think it can come in
9 because it's not hearsay.

10 MS. HELM: Your Honor, it's still -- I don't know how 11:38AM
11 you get around the hearsay. It's putting in information that
12 has no implications other than it's offered for the truth of
13 the matter. It's obviously hearsay and serves no other purpose
14 other than to be offered for the truth of what's stated in the
15 article. 11:38AM

16 THE COURT: This is the dilemma on notice issues. I
17 think what we ought to do, Mr. Clark, is reserve this for
18 discussion when we're not keeping the jury waiting. Because I
19 would like to talk to you more about it. It will take a few
20 minutes. I'd rather not take their time on it. Let's come 11:38AM
21 back to that.

22 BY MR. CLARK:

23 Q. Sir, let me direct your attention to the results column. I
24 would like you just to read it.

25 THE COURT: Read it to himself, right? 11:38AM

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1 MR. CLARK: Himself. Thank you for that
2 clarification.

3 THE COURT: Read it to yourself.

4 BY MR. CLARK:

5 Q. While you are looking, if you could also look at the
6 conclusion, sir, again, reading it to yourself.

11:39AM

7 A. Okay.

8 Q. Now, this was something that got Bard's attention, right?

9 A. Correct.

10 Q. And something that Bard reacted to, right?

11:39AM

11 A. Yes.

12 MR. CLARK: Gay, could you please pull up 1621.

13 BY MR. CLARK:

14 Q. Looking at 1621, do you recognize this document?

15 A. No.

11:39AM

16 Q. Would you have had input into creating talking points for
17 how Bard would react to the Nicholson study?

18 A. Talking points, yes.

19 Q. So if there were key talking points discussed in this item
20 is that something that you would have provided input into?

11:39AM

21 A. Could have, yes. I didn't create this document. I really
22 can't say.

23 Q. Well, it's a response to the Nicholson study, correct?

24 A. Key talking points, correct.

25 MR. CLARK: Your Honor, I would move to admit Exhibit

11:40AM

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1 1621 as a Bard business record that has been produced as such.

2 MS. HELM: No objection.

3 THE COURT: Admitted.

4 MR. CLARK: Could we publish to the jury, Your Honor?

5 THE COURT: Yes.

11:40AM

6 BY MR. CLARK:

7 Q. And on Page 2 -- well, actually, before you go to Page 2,
8 one of the things they look at here was that in Dr. Nicholson's
9 presentation, 5 out of 28 patients with the Recovery were
10 symptomatic whereas zero out of 49 patients with G2 were
11 symptomatic. Right?

11:40AM

12 A. That's the way it reads.

13 Q. So one of the talking points that Bard would be emphasizing
14 to potentially concerned physicians who would see the Nicholson
15 study was that many patients had these problems but were not
16 symptomatic. Is that a fair read?

11:41AM

17 A. That's how I read it.

18 Q. And one of the talking points would also be to say that the
19 Recovery was phased out, right?

20 A. Correct.

11:41AM

21 Q. And that the Recovery and G2 are different filters?

22 A. Correct.

23 Q. And it also talks about other data points from Dr.
24 Nicholson. Do you see that at the bottom?

25 A. Okay.

11:41AM

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1 Q. They found that the fracture rate in the study for Recovery
2 Filters was 25 percent. Is that right?

3 A. Yes.

4 Q. And the fracture rate for the G2 Filters was 12 percent?

5 A. All I can do is read it to you. Looks like it says five of 11:42AM
6 these fractures were symptomatic, 12 percent.

7 Q. 12 percent?

8 A. Yes. That's the way it reads.

9 Q. Turn to Page 2, please.

10 MR. CLARK: This is not the right document. Can you 11:42AM
11 take that off, Gay? Do we have Exhibit 1621? Was that Page 2
12 of 1621?

13 I apologize. We have some technical difficulties
14 here.

15 THE WITNESS: No worries. 11:43AM

16 MR. CLARK: Do we have Page 2 of 1621? There we go.

17 BY MR. CLARK:

18 Q. This is Page 2 of the communication or presentation we just
19 talked about. Under affirmative actions, if you look there,
20 one of the issues was Bill's communication plans. Do you see 11:43AM
21 that second bullet point under affirmative?

22 A. Okay.

23 Q. Who is Bill?

24 A. Bill Little, I'm assuming that we're referencing to. So
25 Bill Little is the VP of marketing. 11:43AM

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1 Q. And the other thing, last bullet point there, was to launch
2 Eclipse ASAP. Right?

3 A. Okay.

4 Q. So one of the responses to Nicholson's study was to get the
5 Eclipse on the market as soon as possible, right.

11:43AM

6 A. It appears that's the language here. And the more I look
7 at this, I'm almost more positive this isn't my document.

8 Q. Okay. That's what the document says?

9 A. That's all I can do is review the document.

10 MR. CLARK: Gay, let's pull up Exhibit 1568.

11:44AM

11 May I publish this to the jury, Your Honor?

12 THE COURT: Yes.

13 MR. CLARK: Your Honor, we have some proposed
14 redactions to this document. We would only publish the first
15 page here.

11:44AM

16 THE COURT: All right.

17 BY MR. CLARK:

18 Q. This document is a post-market design review marketing
19 summary. Is that something that you prepared?

20 A. It appears so.

11:44AM

21 Q. And in the introduction it says that the objective of the
22 Eclipse Filter was to enhance the G2X Filter surface finish
23 through electropolishing to bring it up to emerging industry
24 standards. That's what we talked about earlier, correct?

25 A. Correct.

11:45AM

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1 Q. And also to improve the overall fatigue resistance.

2 Correct?

3 A. Correct.

4 Q. Fatigue means fracture, right?

5 A. No. Again, that's a question for the R&D team. Yeah. You 11:45AM
6 can start getting into nuances that I don't know how to respond
7 to that.

8 Q. When you wrote this, is that something that was your word
9 or a word you needed to use?

10 A. I don't recall back then. I'm influenced when I write 11:45AM
11 these things by what the R&D team is saying, quality team is
12 saying.

13 Q. Okay. Now, one of the things it says on the bottom there
14 is that the enhancement was well received. Right?

15 A. Correct. 11:45AM

16 Q. I'm sorry.

17 MR. CLARK: Gay, go back up to the introduction.

18 BY MR. CLARK:

19 Q. It says the introduction also provided the opportunity to
20 rebrand the line and move it closer to the new divisional brand 11:45AM
21 standards. Right?

22 A. Okay.

23 Q. And then at the bottom it says that the enhancement to the
24 surface finish was well received but that there were some
25 complaints. Right? 11:46AM

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1 A. Sorry. Am I looking for something in this document?

2 Q. Sure. Does it say there that there were some frustrations
3 that were expressed by sales with respect to having to change
4 the name and the code?

5 A. Yeah. It says there were some frustrations with the name
6 change and code change that required going back into each
7 account and switching them all. Correct.

11:46AM

8 Q. For what seemed to many sales reps as minor changes to the
9 product. Right?

10 A. That's the way it reads.

11:46AM

11 Q. And you wrote that that name change was necessary to
12 maintain G2X and Eclipse product differentiation. Is that
13 right?

14 A. Where is that? Sorry.

15 Q. So you are trying to distinguish or maintain a separation
16 between the Eclipse Filter and the G2X and its predecessors,
17 right?

11:46AM

18 A. Are you asking if I wrote that?

19 Q. Yes.

20 A. Yeah. So I mentioned it was necessary to maintain G2X and
21 Eclipse product differentiation.

11:47AM

22 Q. That's a separation. It's a distinction --

23 A. Yes.

24 Q. Two lines of product, keeping them apart?

25 A. Yep.

11:47AM

5-18-18-MD 15-2641-Jones v Bard-Jury Trial-Day 4-A.M.-Baird-Direct

1 Q. And that was true even though there was really only one
2 change between, from the design standpoint, between the G2X and
3 Eclipse, right?

4 A. There was one design change, correct.

5 Q. And that was electropolishing?

11:47AM

6 A. Yeah. Yes.

7 MR. CLARK: Gay, if you could pull up 4416.

8 And may I publish this to the jury?

9 THE COURT: Yes.

10 BY MR. CLARK:

11:47AM

11 Q. Sir, this is a document that talks about Eclipse anchors.

12 Do you see that?

13 A. Could I just do one back to the other one?

14 Q. Yes.

15 A. So I think you mentioned -- could we go back to the other
16 document? I'm sorry. I don't know who to direct that question
17 to.

11:48AM

18 Q. Normally I get to ask the questions of you. We'll make an
19 exception.

20 A. I just wanted to give some clarifying information for you.
21 So when it says the introduction also provided an opportunity
22 to rebrand the line and move it closer to the new divisional
23 brand standards, Bill Little was the VP of marketing at the
24 time, and he had this big push to create a whole new brand look
25 for Bard, new schemes of colors, things like that. So that's

11:48AM

11:48AM

5-18-18-MD 15-2641-Jones v Bard-Jury Trial-Day 4-A.M.-Baird-Direct

1 what he's talking about.

2 Q. Fair enough. Going back to 4416. This is a document you
3 wrote, correct?

4 A. I don't know. It says Filter Marketing.

5 Q. You don't remember whether you authored it?

11:48AM

6 A. I don't remember.

7 Q. There's a section under naming rationale that talks about
8 the Eclipse launch.

9 It's says: The Eclipse launch introduced a product
10 that addressed a shortcoming with its predecessor G2X and G2
11 through electropolishing. We have talked about that, right?

11:49AM

12 A. Okay.

13 Q. And then it goes on to say: The change in brand name and
14 codes was to create a break with the baggage associated with
15 the previous versions despite the fact that the new iteration
16 was the same as the G2X in every way but one.

11:49AM

17 Did I read that correctly?

18 A. Yes.

19 Q. And it looks like from the last paragraph that there was
20 success with that change, right, from both a brand and a
21 product perspective?

11:50AM

22 A. It says: Given the success of Eclipse, I think that's
23 separate, right, the success itself was the Eclipse product,
24 both from the brand and the product perspective. So we changed
25 the brand and that was successful and the product perspective.

11:50AM

5-18-18-MD 15-2641-Jones v Bard-Jury Trial-Day 4-A.M.-Baird-Direct

1 I'm sorry. I don't know what the --

2 Q. Fair enough.

3 A. Again, I don't even know if I authored that.

4 Q. The point of this here is that at this point, the name of
5 the Eclipse would be retained because it was well received,
6 right?

11:50AM

7 A. Yes.

8 Q. And going back up, this was a document that was talking
9 about the Eclipse anchor filter which was going to be the
10 Eclipse Filter with caudal anchors added. Correct?

11:51AM

11 A. Correct.

12 Q. And under value proposition, it says: The Eclipse anchor
13 filter will retain the advantages of G2, G2X, and Eclipse,
14 including the retrievable indication while improving caudal
15 migration resistance. This improvement in caudal migration
16 resistance should reduce tilt, fracture, and penetration. That
17 was the hope of this product, right?

11:51AM

18 A. Correct.

19 Q. And at the same time this was happening -- if we could go
20 to Page 2, Gay -- there were also plans to have another filter
21 called the Denali. Is that right?

11:51AM

22 A. Correct.

23 Q. And this was going to have be a best in class filter?

24 A. Yes.

25 MR. CLARK: And let's just go to the POA for the

11:52AM

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1 Denali, which is 591 Gay.

2 BY MR. CLARK:

3 Q. And this is a document you prepared, correct?

4 A. Yes.

5 MR. CLARK: And may I publish it to the jury, Your
6 Honor?

11:52AM

7 THE COURT: Yes.

8 BY MR. CLARK:

9 Q. So this idea for the Denali was underway at least as of
10 August 2009, is that right? Did I read the date correct?

11:52AM

11 A. Correct.

12 Q. And if we go to Page 2, it says under the summary that this
13 creates an opportunity for a new optional filter that offers
14 improved performance and comparison to our current G2X optional
15 filter technology?

11:52AM

16 A. Yes.

17 Q. It says: Bard is the market leader for sales of optional
18 filters in the United States, but only by a slim margin.

19 Right?

20 A. Correct.

11:52AM

21 Q. So it sounds like you achieved the goal of taking Bard from
22 the 20th percent to a market leader?

23 A. Sounds like it.

24 Q. But only by a slim margin?

25 A. Yep.

11:53AM

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1 Q. And this offering would be to create and improve resistance
2 to movement, fracture, and penetration while maintaining long
3 term retrievability which would help strengthen you position
4 and capture more share. Right?

5 A. Correct.

11:53AM

6 Q. And that's more share of the market?

7 A. Yes.

8 Q. The idea, if you look at the next paragraph, is there would
9 be modifications including penetration limiters. Right?

10 A. Yes.

11:53AM

11 Q. Caudal anchors?

12 A. Yes.

13 Q. Laser cut one-piece design?

14 A. Yes.

15 Q. Electropolish finish?

11:53AM

16 A. Yes.

17 Q. Enhanced design with broad shoulders for centering. Right?

18 A. Correct. And we're talking about Denali right now.

19 Q. Okay. And the reason for these designs, if we change this
20 when you go back up, is that some of the most common inputs we
21 receive, being Bard, from customers in the sales force for the
22 G2 and G2X products pertain to filter complications that
23 compromise retrievability including migration, tilt, and
24 penetration. Right?

11:53AM

25 A. That's what the document says.

11:54AM

~~5-18-18-MD 15-2641-Jones v Bard-Jury Trial-Day 4-A.M.-Baird-Direct~~

1 Q. And it also says that filter fractures are not reported as
2 often but tend to have more serious results. Did I read that
3 correctly?

4 A. Yes.

5 Q. So Bard wanted to address those by creating this next
6 generation filter, right?

11:54AM

7 A. Correct. Yes.

8 Q. Now let's go back to caudal anchors for a second.

9 MR. CLARK: Can you pull up 4469.

10 May I publish 4469, Your Honor?

11:54AM

11 THE COURT: Yes.

12 BY MR. CLARK:

13 Q. Sir, do you recognize this?

14 A. No.

15 Q. I think I have the wrong document here.

11:55AM

16 Well, sir, do you now know that the Meridian ended up
17 being the next generation after the Eclipse Filter.

18 A. Correct. Yes.

19 Q. And that had caudal anchors, right?

20 A. Yes.

11:55AM

21 Q. And did the caudal anchors improve the problem of
22 migration?

23 A. I don't know. You would have to go get the data for me.

24 Q. It's not something you remember off the top of your head?

25 A. No.

11:55AM

~~5-18-18-MD 15-2641-Jones v Bard-Jury Trial-Day 4-A.M.-Baird-Direct~~

1 Q. Let me see if I find it for you.

2 MR. CLARK: One second. I apologize to the jury and
3 the Court.

4 Could you pull up 4499, Gay?

5 May I publish this to the jury, Your Honor.

11:56AM

6 THE COURT: We don't show that as being in evidence
7 Mr. Clark.

8 MR. CLARK: I apologize. I thought I moved this into
9 evidence. Plaintiff would seek admission of this document. I
10 believe it was the last one. I might have misspoke.

11:56AM

11 THE COURT: This is 4449?

12 MR. CLARK: 4499.

13 THE COURTROOM DEPUTY: He moved 4498.

14 THE COURT: I show 4499 as admitted.

15 Yes, you may publish it.

11:57AM

16 BY MR. CLARK:

17 Q. Okay. Do you see this?

18 A. Yes.

19 Q. And this is a Bard document, correct?

20 A. Correct.

11:57AM

21 Q. Is that something that you would help prepare for marketing
22 purposes?

23 A. Yes.

24 Q. And this shows a 16 to 1 improvement in caudal migration
25 with the Meridian?

11:57AM

5-18-18-MD 15-2641-Jones v Bard-Jury Trial-Day 4-A.M.-Baird-Direct

1 A. Okay.

2 Q. You agree with that? That's what this shows?

3 A. That's what this shows.

4 Q. Now, is it your understanding that improving caudal
5 migration in Bard's view would also improve other conditions
6 such as tilt, puncture, and fracture?

11:57AM

7 A. It was a hypothesis. It was definitely a hope.

8 Q. And that was something that you would put into the product
9 opportunity assessments for the Meridian product, right, that
10 was what was hoped to have happened?

11:57AM

11 A. Let me think if that was with Meridian. Correct. Yes.

12 That was something that the team would put in.

13 Q. Now, Bard understood, or hypothesized, that adding caudal
14 anchors was going to have a dramatic improvement on caudal
15 migration. Right?

11:58AM

16 A. I don't know if dramatic or not. But that was the hope
17 that that would happen.

18 Q. It did have an improvement on caudal migration according to
19 this document?

20 A. According to this document, yes.

11:58AM

21 Q. Now while this Meridian was being developed --

22 A. Sorry. Can I just look at this document a little bit more?
23 Because I think -- this is talking about bench testing, but you
24 would have to dig into this with R&D.

25 Q. So bench testing may or may not be reliable. Is that what

11:58AM

5-18-18-MD 15-2641-Jones v Bard-Jury Trial-Day 4-A.M.-Baird-Direct

1 are you saying?

2 A. That's a question for R&D.

3 Q. But this document is at least promoting that the Meridian
4 vena cava demonstrates a significant improvement in caudal
5 migration resistance when compared to Eclipse vena cava filter.
6 Right? 11:58AM

7 A. Correct. If you look at the bullet points, bench test
8 results may not necessarily be indicative of clinical
9 performance.

10 Q. At least what this document is telling us is the data they
11 are analyzing shows a 16 to 1 improvement? 11:59AM

12 A. Correct.

13 Q. And did Bard tell physicians before the Meridian was on
14 line that they were in the process of developing something that
15 they thought would have a significant improvement on caudal
16 migration? 11:59AM

17 A. I have no idea.

18 Q. Do you know whether at any time while you were with Bard
19 there were any discussions about taking Eclipse off the market
20 until the Meridian could come on line? 11:59AM

21 A. I don't recall.

22 THE COURT: We're going to break at this point, Mr.
23 Clark.

24 Ladies and Gentlemen, we'll plan to resume at 1:00.

25 We'll excuse you now. 11:59AM

5-18-18-MD 15-2641-Jones v Bard-Jury Trial-Day 4-A.M.

1 (Jury out at 12:00 p.m.)

2 THE COURT: Mr. Clark, when I said you need to slow
3 down I meant the pace at which you are speaking, especially
4 when you are reading. The court reporter is having a real hard
5 time keeping up.

12:00PM

6 MR. CLARK: I apologize.

7 THE COURT: Let me give you your time before we break.

8 Okay. Counsel, as of now, plaintiff has used 13
9 hours, 26 minutes. Defendants have used three hours and 21
10 minutes.

12:02PM

11 Mr. Clark, on that issue about notice versus
12 admissibility, it seems you pretty much covered it with the
13 next document that came in. Do you still want to move that
14 Nicholson report in?

15 MR. CLARK: Your Honor, I think it's important because
16 of the conclusion, which is what Bard was reacting to. So I
17 would like to move that into evidence. And again, I don't
18 think it's offered for the truth of the matter asserted. It's
19 just an information out there that Bard was reacting to.

12:02PM

20 MS. HELM: Your Honor, I think having looked at it and
21 discussed it, I believe it's admissible. But we would ask for
22 a limiting instruction that it's not being offered for the
23 truth of the matter asserted and that it's solely being offered
24 for the purpose that it was out there and available. It's just
25 like the SIR guidelines as we discussed in the Booker case.

12:02PM

12:02PM

5-18-18-MD 15-2641-Jones v Bard-Jury Trial-Day 4-A.M.

1 THE COURT: I will give that limiting instruction if
2 you want to move it in again when the jury is back.

3 MR. CLARK: I will.

4 THE COURT: Okay. See you at 1:00.

5 (Proceeding recessed at 12:03 p.m.)

12:02PM

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C E R T I F I C A T E

I, LAURIE A. ADAMS, do hereby certify that I am duly appointed and qualified to act as Official Court Reporter for the United States District Court for the District of Arizona.

I FURTHER CERTIFY that the foregoing pages constitute a full, true, and accurate transcript of all of that portion of the proceedings contained herein, had in the above-entitled cause on the date specified therein, and that said transcript was prepared under my direction and control.

DATED at Phoenix, Arizona, this 18th day of May, 2018.

s/Laurie A. Adams

Laurie A. Adams, RMR, CRR